FILED

JUL 1 - 1998

OFFICE OF THE CLERK

No. 98 57

In The

Supreme Court of the United States

October Term 1997

ALBERT D'AURIZIO,

Petitioner,

v.

BOROUGH OF PALISADES PARK, BOARD OF EDUCATION OF PALISADES PARK, WILLIAM MARESCA, individually and as Mayor of Palisades Park, PAUL ALBANESE, individually and as a member of the Borough Council, MICHAEL DeBARTOLO, individually and as a member of the Board of Education, VIRGINIA DeBARTOLO, individually and as a Borough official, MARY BETH COTTRELL, individually and as a member of the Board of Education, ROBERT CARNEY, individually and as a member of the Board of Education, CAROL KILLION, individually and as a member of the Board of Education, FRANCIS VALENZUELA, individually and as a member of the Board of Education, DAVID EICHENHOLTZ, individually and as an officer of the Board of Education, THOMAS TUSCANO, individually and as a member of the Palisades Park Republican Club, SUSAN GIACOBONE, individually and as an executive member of the Palisades Park Republican Party CARMINE VERDICCHIO, individually and as Lead Custodian of the Board of Education, JAMES NICHOLS, individually and as an officer of the Board of Education, MATTHEW NICHOLS, individually and as a member of the Board of Education, GEORGE FASCIANO, individually and as Superintendent of Board of Education, PETER MAROSE, individually and as a member of Board of Education, and SMITH, DON, ALAMPI & D'ARGENIO, individually and as counsel for the Board of Education,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITION FOR WRIT OF CERTIORARI

Michael S. Kimm
Counsel Of Record
505 Main Street, 3rd Floor
Hackensack, NJ 07601
(201) 342-3377

Appellate Service: Curry & Taylor (800) 222-8738

130 pp

QUESTIONS PRESENTED

I. WHETHER THE PETITIONER WAS DENIED FIFTH AMENDMENT DUE PROCESS AND SEVENTH AMENDMENT TRIAL BY JURY BECAUSE THE LOWER COURTS EGREGIOUSLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF AUTHORITY UNDER RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

II. WHETHER THE PETITIONER WAS DENIED FIFTH AMENDMENT DUE PROCESS AND SEVENTH AMENDMENT TRIAL BY JURY BECAUSE THE LOWER COURTS FAILED TO APPLY PROPER PROOF METHODOLOGY IN THIS POLITICAL-RETALIATION CASE WHICH RESULTED IN DISMISSAL AND CREATED AN INTER-CIRCUIT CONFLICT

III. WHETHER THE PETITIONER WAS DENIED FIFTH AMENDMENT DUE PROCESS BECAUSE HE WAS PRECLUDED FROM OBTAINING RELEVANT EVIDENCE UNDER A NEW SO-CALLED "POLITICAL VOTE PRIVILEGE" IN THE LOWER COURTS' CONSTITUTIONALLY IMPERMISSIBLE ADVISORY OPINION, WHICH CONTRIBUTED TO THE DISMISSAL OF PETITIONER'S CASE

IV. WHETHER THE PETITIONER WAS DENIED FIFTH AMENDMENT DUE PROCESS BECAUSE THE COURTS BELOW DISMISSED ALL DEFENDANTS WHEN ONLY SOME OF THEM MOVED FOR DISMISSAL.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

Overview 2

Plaintiff's job and political activity 4

Defendants 1992 election and conspiracy 5

Defendants' Specious Denials and Lack of Evidence 8

The School Board and Its Counsel 10

Board of Education 12

Toscano and Fasciano 12

The Borough and related defendants Maresca and Albanese 12

The Valenzuela Connection 14

Summary of the Facts 14

REASONS FOR GRANTING THE WRIT 16

Introduction 16

I. PETITIONER WAS DENIED FIFTH AMENDMENT DUE PROCESS AND SEVENTH AMENDMENT TRIAL BY JURY BECAUSE THE LOWER COURTS EGREGIOUSLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF AUTHORITY UNDER RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE 16

A. The Lower Courts Departed from the Usual Course of Authority Under Rule 56 16

B. The Lower Courts Departed From The Usual Course of Section 1983 and First Amendment Authority 20

C. The Lower Courts Departed from the Usual Course of Authority Under the Section 1985 Statutory Framework 24

D. The Lower Courts Departed from the Usual Course of Authority Under the Supplemental Jurisdiction Law and Effectively Invalidated an Act of Congress 24

E. The Lower Courts Departed from the Usual Course Departed from the Usual Course of Ruling only on the Basis of Evidence 26

II. PETITIONER WAS DENIED FIFTH AMENDMENT DUE PROCESS BECAUSE THE COURTS BELOW DISMISSED ALL DEFENDANTS WHEN ONLY SOME OF THEM MOVED FOR DISMISSAL 26

III. PETITIONER WAS DENIED FIFTH AMENDMENT DUE PROCESS BECAUSE HE WAS PRECLUDED FROM OBTAINING RELEVANT EVIDENCE UNDER A NEW SO-CALLED "POLITICAL VOTE PRIVILEGE" IN THE LOWER COURTS' CONSTITUTIONALLY IMPERMISSIBLE ADVISORY OPINION, WHICH CONTRIBUTED TO THE DISMASSAL OF PETITIONER'S CASE 27

IV. PETITIONER WAS DENIED FIFTH AMENDMENT DUE PROCESS BECAUSE THE COURTS BELOW DISMISSED LL DEFENDANTS WHEN ONLY SOME OF THEM MOVED FOR DISMISSAL 30

CONCLUSION 30

Appendix

Exhibit A - Circuit Court Opinion 1a
Exhibit B - District Court Opinion 4a
Exhibit C - District Court Opinion 23a
Exhibit D - District Court Opinion 39a
Exhibit E - District Court Opinion 56a
Exhibit F - District Court Opinion 75a

TABLE OF AUTHORITIES

Page

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-52 (1986) 17

Buchana v. Sherrill, 51 F.3d 227, 228-29 (10th Cir. 1995) 18

Buckley v. Valeo, 424 U.S. 1, 74 (1976) 29

Burka v. N.Y. City Transit Authority, 110 F.R.D. 660, 667 (S.D.N.Y. 1986) 29

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 17

Colburn v. Upper Darby Twnshp, 838 F.2d 663, 667 (3rd Cir. 1985) cert. denied, 109 S.Ct. (1989) 23

Connick v. Myers, 461 U.S. 138, 142, (1983) 22

Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 456 (1992) 17

Elrod v. Burns, 427 U.S. 353, 353-63 (1979) 20

Erie Ry. Co. v. Thompkins, 304 U.S. 64 (1938) 28

Grossman v. Shwarz, 125 F.R.D. 376, 381 (S.D.N.Y. 1989) 30

Horn v. Kean, 796 F.2d 668, 671 (3d Cir. 1986) 22

Hutchinson v. Proxmire, 443 U.S. 111 (1979) 17

In re Grand Jury Proceedings, 776 F.2d 1099, 1103 (2d Cir. 1985) 29

Jacobellis v. Ohio, 378 U.S. 184, 195 (1964) 22

Jaffe v. Redmond, ___ U.S. ___, 116 S.Ct. 1923 (June 13 1996) 28

Johnson v. Gudmundsson, 35 F.3d 1104, 1108 (7th Cir. 1994) 18

Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973) 22

Local 1814, Int'l Longshoremen's Assn v. Waterfront Comm'n, 667 F.2d 267, 271-73 (2d Cir. 1981) 29

Lovell Mfg. v. Export- Import Bank of the United States, 843 F.2d 725 (3d Cir. 1988) 25

Lyng v. International Union, UAW, 485 U.S. 360 (1988) 22

MCI Telecom Corp. v. Teleconcepts, Inc., 71 F3 1086, 1102 (3d Cir. 1995) 25

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 16, 23, 24, 26-27

McLaurin v. Prater, 30 F.3d 982 (8th Cir. 1994) 25

Memorial Hospital v. Shadur, 664 F.2d 1058 (7th Cir. 1981) 29

Nebraska v. Wyoming, 113 S. Ct. 1689, 1694 (1993) 16

Parratt v. Taylor, 451 U.S. 527, 535 (1981) 23

Patel v. Penman, 103 F.3d 868 (9th Cir.) (applying discretion), cert. denied, 117 S.Ct. 1845 (1996) 25

Perez v. Cucci, 725 F.Supp. 209, 231 (D.N.J. 1989) 22, 23

Perry v. Sindermann, 408 U.S. 593, 597, (1972) 22

Professional Programs Group v. Dep't of Commerce, 29 F.3d 1349, 1353 (9th Cir. 1994) 18

Riley v. Jeffes, 777 F.2d 143, 145 (3d Cir. 1985) 23

Shanaghan v. Cahill, 58 F.3d 106 (4th Cir. 1995) 25

St. Mary's Honor Center v. Hicks, 970 F.2d 487, 490-91 (8th Cir. 1992), cert. granted, 509 U.S. 502 (1993) 26

Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1555 (10th Cir. 1995) 18

Trammel v. United States, 445 U.S. 40, 48 (1980) 28

Tully v. Mott Supermarket, Inc,. 540 F.2d 187, 195-96 (3d Cir. 1976) 24

United States v. AT&T, 524 F.Supp. 1381, 1389-90 (D.D.C. 1981) 30

United States v. Nixon, 418 U.S. 683 (1974) 29

University of Penn. v. EEOC, 493 U.S. 182 (1990) 29

West v. Atkins 487, 487 U.S. 42, 108 S.Ct. 2550, 2556 (1988) 23

World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1474 (10th Cir. 1985), cert. denied, 474 U.S. 823 (1985) 19

Constitutional Provisions

Article III of the Constitution 30

U.S. Constitution, Article III 1, 30

United States Constitution, 1st Amend. 1

United States Constitution, 5th Amend. 1

United States Constitution, 7th Amend. 1

Other Authorities

David D. Siegle, Practice Commentary to 28 U.S.C.A. 1367, at 829, 835-36 (West 1991) 25

Federal Trial Handbook 2d, § 51.23 27

Proposed F.R.E. 507; Notes of Committee on The Judiciary, Senate Report No. 93- 1277 (hereinafter Senate Rep.), reprinted at 1977 U.S. Code & Cong. Admin. News 7051, 7058 27

Rules and Regulations

Palisades Park Borough's Rule 30(b)(6) 27

F.R.E. 501 28

F.R.E. 801(b)(2)(B) 19

F.R.E. 801(d)2)(E) 19

L. C.V.. Rule 7.1(c)(4) (formerly Gen. R. 12C) 18

U.S.S.C. Rule 10 16

F.R.C.P. Rule 50(a) 16

F.R.C.P. Rule 56 ..... 16, 19, 26

Statutes

28 U.S.C. 1254(1) 1

28 U.S.C. § 1331 28

28 U.S.C. 1367 ..... 2, 25

42 U.S.C. 1983 ..... 1, 24, 26

42 U.S.C. 1985(3) 2

OPINIONS BELOW

The opinion of the Court of Appeals is set forth at Appendix A. The opinions of the district court are set forth as Appendix B through F.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1254(1). The petition is timely filed under Rule 13.1 of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Article III:

> The judicial Power shall extend to all Cases, ... [and] Controversies . . . .

United States Constitution, 1st Amend.:

> "Congress shall make no law . . . abridging the freedom of speech . . . or association. . . ."

United States Constitution, 5th Amend.:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

United States Constitution, 7th Amend.:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. 1983:

> Every person who, under the color of any statute, ordinance, regulation, custom or usage of any state...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights,

privileges or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

42 U.S.C. 1985(3):

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; [then there shall be a violation].

28 U.S.C. 1367(a), (c):

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if --

(3) the district court has dismissed all claims over which it has original jurisdiction.

STATEMENT OF THE CASE

Overview

This action seeks legal and equitable relief for a wrongful political termination. Plaintiff Albert D'Aurizio (pronounced "der-izzio") was employed as a custodian at the Palisades Park High School, earning less than $30,000.00 per year in 1991. In November 1991, Mr. D'Aurizio sought to participate in the

American political process as a candidate for the borough council. A former Republican Party member, after being disillusioned by his Party, Mr. D'Aurizio ran as an Independent candidate and, eventually, lost the election. His candidacy, however, caused a division among local Republicans, and a number of Palisades Park officials conspired to "get rid of Al because he ran against us."

Plaintiff was terminated on June 9, 1992. Following his termination, the D'Aurizio family, including three children, was forced to leave its home, which had been foreclosed, and to live under severe economic hardship. This was defendants' punishment for Mr. D'Aurizio's attempt to participate and contribute in the American political process.

The Board's own documents produced in discovery reveal that, after plaintiff was terminated, the Board hired other substitute employees without recalling plaintiff to his job. The budget documents show that the custodial line item allocation was increased for the year 1992-93 by approximately $50,000 above the previous school year. Consistent with this increase, the Board's Answer and Defenses, A67-92, did not invoke a "budget reduction" defense. The district court, however, ultimately dismissed the case on this rationale.

In five separate decisions, the district the district court[1] not only dismissed the case as against those who moved for dismissal, but also gratuitously dismissed the remaining defendants who did not seek dismissal. In this process, not only did the district court totally ignore the stark, material facts presented in plaintiff's papers, the district judge misunderstood and misapplied the settled law. The undisputed record showed the following facts and favorable inferences.

Defendant Berek Don (the Board of Education counsel at all relevant times, and a partner in the Smith Don law firm) was

---

[1] When filed in 1993, this case was assigned to District Judge Nicholas H. Politan. See Docket entry 2. On September 23, 1996, the case was reassigned to District Judge Joseph A. Greenaway, following his appointment to the bench. The reassignment Order follows Docket entry 176.

the Chairman of the Bergen County Republican Party. He is the highest ranking Republican official in the county. Plaintiff filed a sworn statement that, to the best of his own knowledge, no Republican Party decision is made in Bergen County without Mr. Don's review and participation. A1479.

Defendant Thomas Toscano was the Palisades Park Municipal Chairman. As such, Mr. Toscano is the highest ranking Republican Party man in Palisades Park, and no Republican Party decision is made in Palisades Park without Mr. Toscano's review and approval. Mr. Toscano is responsible for personally approving each candidate for (1) school board elections and (2) borough and council elections. Mr. Toscano retains authority over political strategy, sign-making, general campaign advice, and the goings on at the Palisades Park Republican Club. In the hierarchy, Mr. Toscano is answerable to Mr. Don, whom he characterized as his "political boss." The position of municipal chairman is a state-law created official position. A1479-80.

Defendant William Maresca was the Mayor of Palisades Park between 1991 and 1995. He resigned in November 1995. Defendant Paul Albanese (Albanese) is a Republican councilman who was a close friend of Maresca. He has been in office since 1991, and recently lost a mayoral primary challenge against Susan Spohn, who succeeded Maresca. Albanese said that he lost because Toscano hand-picked Spohn over him.

All of the other moving defendants are Republicans. (All of the non-moving defendants are Republican as well.) All of these individuals also are directed by Mr. Toscano. A1480- 81.

Plaintiff's job and political activity

In early 1991, plaintiff applied for and was employed as a part-time custodian with the Board of Education. In August 1991, plaintiff's position became full time. A1480. He was earning less than $30,000 per year and barely supported his loving family.

Through this time and for all of plaintiff's life, he had been a loyal Republican and friend to virtually all of the

defendants. In 1991, his belief in the Republican Party fell into doubt. In November 1991, plaintiff announced his Independent candidacy for the local council elections. Defendants Michael De Bartolo, a Republican loyalist, threatened plaintiff that he would lose his job if he did not withdraw. A1481. Defendant Maresca told plaintiff and his wife that it was imperative for him to withdraw from his candidacy, so as not to cause a Party division.

Plaintiff did not withdraw. In November 1991, he lost the election by a wide margin. From this point forward, the defendants have been retaliating against plaintiff and his family. A1481. The retaliation has been systematic, carefully schemed and orchestrated, in a manner perceived by the district court to be just another governmental down-sizing.

Defendants 1992 election and conspiracy

During the April 1992 school board elections, defendants Matthew Nicholas (a CPA), Robert Carney (a bank executive) and Michael De Bartolo (an Economics M.A.) were slated by the Republican Party. Defendant Toscano personally approved these people as official Republican candidates. Id.

Even though state law requires school board campaigns be non-partisan, in their fliers, these three candidates openly ran a political campaign, even suggesting that plaintiff's job was a "patronage" position which they intended to eliminate. A1481. See Exhibit 1. A1496 (C.A.R.E. flier). These three candidates did not even know who was running their campaign; all they wanted was to win a political election. See Carney Dep. Tr. Exhibit 2. A1499. They used "palm cards" which even bore an elephant picture, with red, white and blue color layout to symbolize the Republican logos. See Exhibit 3 (dep tr. of Maresca). A1501. While the elephant is the national logo, the color combination is the local logo. A1481. Based on plaintiff's personal experience, those cards and other political fliers must first be approved by defendant Toscano. A1482. The Republican elephant palm cards

for the April 1992 school board candidates on the Republican slate were approved, undoubtedly by defendant Toscano. These were distributed by Republican supporters, who included Mayor Maresca. See id.

The Republican trio were voted in. They held a reorganizational meeting on April 19. A1482. But even before they took office -- indeed, even before the April 7, 1992, elections -- sometime in March 1992, another Republican agent, Linda Sherwood, prepared the "hit list" of persons whose jobs were supposed to be terminated once the 4/92 trio became voted in. Id. That hit list is annexed at A1503. In other words, even before there was any budget problem, there was already a manufactured agenda for "budget cuts" with specific names, including plaintiff's. A1482.

When budget cuts are made in the Palisades Park government, they are supposed to be made under the rubric of departments, positions or line items, and not by names. Id. In this case, Sherwood identified specific names. Id. Sherwood, the right-hand of Municipal Chairman Toscano, who always guided her political activity, was not a member of the Board of Education after April 7, 1992, but she alone prepared the "hit list" and provided it to the 4/92 Republican trio, who implemented it. Id.

Shortly after the April 7, 1992, election and after the 4/92 trio took office, the Borough council supposedly had a "joint meeting" with the Board of Education. Contrary to the New Jersey Sunshine Law (Open Public Meetings Act) which requires such meetings to be memorialized in official written minutes, there is no written record or log or minutes of such a meeting -- certainly nothing was produced during discovery. A1482. On April 22, 1992, however, the Borough government adopted a "Resolution" for budget cuts, based on the non- existent "joint meeting." Exhibit 5. The items proposed to be cut in the resolution overlap the pre-fabricated "hit list" made by Sherwood, which in turn incorporates the elements contained in the 4/92 trio's admitted political flier criticizing plaintiff's position, among others, as "patronage." A1483.

Although the Borough resolution states that there is a budget shortage, the reality was there was no budget shortage. In the official budget document promulgated at the same time, there was actually an increase in the allocation to the custodial maintenance line item or account 610. See A1515. Defendants were speaking from both sides of their mouths: On one hand, they told the public that the line item 610 was being increased from $448,500 in the prior year to $505,163 for the upcoming year; secretly, on the other hand, they had prepared the April 27, 1992, resolution.

Neither the school board nor the Borough government undertook any budgetary review before adopting the so-called budget-cut resolution, and never studied the effects after adopting such a course. A1483. The resolution process has been practiced by the borough for years, but adopting a detailed set of cuts without any foundational understanding of the budget problems, if any, was unheard of. Id. But that is what the undocumented, secret "joint meeting" resulted in. Id.

On June 2, 1992, plaintiff was advised in a pro forma letter by the Board, that his job would be discussed at a June 9 meeting. On June 9, his job was "officially" terminated "due to budgetary constraints. But there was no discussion. Plaintiff was simply terminated in an closed-session. There is no memorialization, no minutes and no other record of the vote. A1483-84.

Before June 9, none of the Board members or the borough government officials were supposed to have known that plaintiff would be terminated. This is plainly so because they did not know where a budget cut would be allocated until the termination decision was made. Id. Yet, all of the defendants knew already in March 1992 because under Municipal Chairman Toscano's supervision, non-party Sherwood made the prefabricated allocation in defendants' "hit list," that plaintiff would be terminated.

To ensure this result, a core group of the defendants held a secret meeting in the conference room of the Rotolo and Rotolo law firm in town. As stated in the First Amended

Complaint (incorporated into the D'Aurizio declaration), at that meeting, Municipal Chairman Toscano, Mayor Maresca and Councilman Albanese, and Board president Carol Killion attended, among others. A1484. The group decided to use defendant Francis Valenzuela to fill a vacancy in the board membership, and insure a Republican majority and "get rid of" plaintiff's job.

In fact, two days later, on June 9, 1992, Valenzuela became the ninth board member, and promptly voted to eliminate plaintiff without even knowing anything about the supposed budgetary problems. A1484. This is palpable proof that Valenzuela was participating in a wrongful conspiracy to eliminate plaintiff.

Defendant Killion, then-board president, is plaintiff's sister-in-law. In 1995, she testified as a witness in a third- party's law suit that a political deal had been struck between Republican factions concerning plaintiff's termination. A1519- 21. Killion testified at that deposition, well before her brother- in-law's lawsuit, "I gave you my brother in law, what more do you want?" to her Republican cohorts. She also testified at that time that, during the course of the June 7, 1992, meeting at the Rotolo firm, defendant Albanese, the leading councilman, said of plaintiff, "fire him."

Neither the Board, nor any of the other defendants denied any of these detailed admissions and facts in spite of numerous opportunities to do so, in the various stages of the lawsuit. In the face of these facts, a number of the defendants sought summary judgment. The bases of their motions are considered in turn.

Defendants' Specious Denials and Lack of Evidence

Defendants proffered no admissible evidence in their motions before the courts below. They disputed plaintiff's evidence, and thereby created issues of fact, but the essential facts were, as stated by plaintiff, were admitted.

It has always been the Board's policy that the Business Administrator and the Superintendent make recommendations concerning hiring, firing and other employment decisions of custodial/maintenance employees. A1485; A1523-35 (policy statement). The Superintendent is also in charge of signing the pay checks, payroll roster, and reviewing the budget. A 1485.

In addition to these formal policy statements, plaintiff had always been told by the Board that the Superintendent is as responsible for his job hiring and firing along with the board members and the board counsel. A1486. Indeed, when plaintiff was terminated under the sham "budgetary constraint" pretext, defendant Fasciano signed the termination letter, stating that plaintiff's termination was based on a "clear mandate of the Board" based on "budgetary constraints" which no one had reviewed and thus necessarily could not have known. Id. Both defendants Nichols and Fasciano were in that same position. Id.

Even worse, after plaintiff's initial layoff in June 1992, more than a dozen new custodial employees were hired through news paper advertisements without affording plaintiff his duly entitled right of first refusal and right to be re-employed based on seniority. A1486. Defendants Nichols and Fasciano were responsible for these violations, as well as being responsible for failing to place plaintiff on the priority rehiring list, in accordance with the Board's official policy. Defendant Fasciano admitted this failure in his deposition. A1486; A1537-40 (Fasciano's deposition admissions).

In spite of these facts, defendant Nichols filed a cursory, purportedly-sworn statement that he had nothing to do with plaintiff's termination, or with placing his name on the priority rehiring list. A1086-88.

Defendant David Eichenholtz said that a Nichols held a meeting in his own office, for which Nichols had prepared an agenda (which was never produced in discovery and thus prompted plaintiff's cross-motion). At that meeting, according to defendant Eichenholtz, Nichols attended with high school principal Anthony Caruso, lead custodian Carmine Verdicchio, board

president Carol Killion and defendant De Bartolo, who was Chairman of the Buildings and Grounds Committee of the Board, and negotiated a political "deal" not to bring plaintiff back after his initial termination. These people agreed that plaintiff's name was not to be placed on the re-employment list, or offered any other position, even though he was entitled to that under the board policy which, in turn, mirrored the state law. A1486-87.

While plaintiff was employed, both the Superintendent and the Lead Custodian retained supervisory control over plaintiff and the other custodians. This did not change after plaintiff's layoff. In the face of plaintiff's numerous written grievances, A1296 ff, for which the board never gave an answer, these people struck "a deal" affecting plaintiff's livelihood in a discriminatory manner. In recognition of his admission that he was involved in that political deal, defendant Eichenholtz did not even bother filing a dismissal motion, realizing its futility.

The School Board and Its Counsel

As stated in the First Amended Complaint, in April 1992, months before anyone had supposedly decided to terminate my job, Berek Don, the Board's general counsel, already knew that plaintiff was being terminated. This is consistent with Sherwood's "hit list" and consistent with the 4/92 trio's political flier characterizing plaintiff's position as "patronage," to be terminated, well before any "budgetary problems" surfaced. A1487.

The conspiracy actually began in April 1991, when plaintiff decided to run. But by April 1992, it is beyond any dispute that even attorney Don knew that plaintiff would be terminated. Thus, as stated in plaintiff's deposition testimony (see moving Exhibit A), Mr. Don gave plaintiff's sister-in-law, the Board president, a job application to Bergen Pines Hospital, where plaintiff would have earned $5 per hour, or roughly one- third of my then-pay, without benefits, in exchange for "going quietly." A1488; see A1112-14 (plaintiff's deposition discussing Don's providing a job application).

Smith, Don's papers in the record are inadequate. First, there was a total failure to offer competent evidence in an admissible form. Smith, Don's Rule 56 memorandum contains numerous unsupported allegations of fact. For example, on page 2, it argues that "The elimination [of plaintiff's job] was at that time [in April 1992] already part of a resolution adopted by the Mayor and Council." Def. Br. at 2. This is an interesting observation, even if it is not supported by competent testimony. This is because in April 1992, no one should have known that plaintiff specifically would be terminated, as opposed to there being a proposed budgetary reduction in the works since plaintiff was terminated on June 9, 1992. Yet, as Smith, Don's unsupported memorandum says, Board counsel Berek Don knew that plaintiff was already known to be terminated in April 1992 -- a full two months before he was even given a pro forma notice of termination by defendant Fasciano. The only source of that advance knowledge is former Board member Sherwood's preconceived "hit list."

Smith, Don's brief also argued -- again without any supporting evidence -- that defendant Killion lied about her true knowledge of attorney Don's involvement in the conspiracy to terminate plaintiff, because she told me that he gave her the Bergen Pines application to forward plaintiff. If he did not know about plaintiff's impending termination, why would he advance an application for a possible substitute job? While Mr. Don's memorandum argues that defendant Killion said that she had asked Mr. Don to help her out, she told plaintiff in 1992, at the most reliable time, when her recollection was fresh, that it was Mr. Don who proposed her to approach me with the Bergen Pines application. A1488. These facts, again, were totally undisputed by Mr. Don.

Plaintiff filed a series of written grievances with the Board, with copies to its general counsel. See esp. A1301 (grievance describing political retaliation against plaintiff). The Board and its counsel failed to respond substantively to any of these.

Board of Education

The Board's purported Rule 56 motion and argument were not even properly supported with competent, admissible evidence. As with Smith Don, no one filed an affidavit, certification or declaration proffering any admissible evidence. Instead, like Smith Don, certain documents were simply annexed to the Board's memorandum of law such that there was nothing in the record for the lower courts to examine. (See argument below regarding the non-filing of briefs in the District of New Jersey).

Toscano and Fasciano

Defendant Fasciano admitted that the Board's failure to rehire plaintiff was improper. See Fasciano Cert. in support of summary judgment. He also admitted taking no faction to reinstate plaintiff himself, or to persuade others to do so, particularly when the Board announced its pro forma "vote" to terminate plaintiff, see A1545. Thus, Fasciano was joined as a coconspirator having supervisory responsibility as did his successor, defendant Nichols, who breached the same duties. When plaintiff filed a detailed written grievance, defendant Fasciano responded that there was "no validity" to it, A1457, even though he admitted at deposition that he had not investigated plaintiff's grievance. Id. These are stark admissions indeed from one of the officers having a policy-making authority.

Defendant Toscano attempted to characterize himself as a mere "private person," when he is the most politically powerful figure in the municipality and he, too, concedes the fact that he directed the other defendants' conspiracy to terminate plaintiff, and presided over the June 7, 1992, meeting at the Rotolo law firm.

In spite of these facts, the lower courts granted their Rule 56 motion in a ruling that departs markedly from the usual course of summary judgment procedures.

The Borough and related defendants Maresca and Albanese

As stated in the First Amended Complaint, above, and in the Declaration of Debbie D'Aurizio, A1413 (which adopts the First Amended Complaint by reference), defendant Maresca, as Mayor, made it his practice to support supposedly- non-partisan school board candidates, and even distributed their elephant political advertisements. A1492. He and his main Republican councilman, defendant Albanese, attended the June 7, 1992, secret meeting at the Rotolo law firm to appoint none other than Maresca's personal friend and political operative, defendant Valenzuela, to fill the vacant board seat. At the meeting, defendant Albanese, clearly appearing at the meeting as a political party representative, said "fire him," referring to the plaintiff. A1492; A1552.

These statements are directly traceable to plaintiff's November 1991 election campaign and nothing else. But for running against his former Party, plaintiff would not have been the target of their retaliation. The only nexus between defendants' actions and plaintiff's job termination was and still is his 1991 campaign. Thereafter, the leading politicians in Palisades Park had repeatedly warned plaintiff that he would be terminated. A1493. The record is undisputed, and that is exactly what happened.

The Mayor and Councilman had a custom and practice of influencing the local school board elections, and in April 1992, their custom and practice resulted in the Mayor's distributing the Republican political fliers bearing the elephant mascot at the polling stations. Id. On April 27, 1992, the borough's custom and practice of pre-fabricating the "budget" by specific references to plaintiff, before he was properly terminated, resulted in a budget cut resolution adopted without any underlying review or study, which the board of education then simply adopted without its independent study or review. A1493.

While the Borough suggests that the budget was cut in the custodial line items, the real budget documents plaintiff obtained clearly show that the custodial line item 610 was to increase in the 1992/93 school year, which was the year of the

supposed "budget reasons" for which plaintiff was eliminated. Id. Casting an even stronger light to the sheer lack of defendants' credibility, a Bergen Record article on July 30, 1993, discusses the $2 million budget deficits in recent years, A1556-57, over which the Board defendants appeared to have no idea. But while those deficits were linked to improvement and repair contracts, A1557, implicating a corrupt contracting practices, the deficits were not traceable to the custodial line item relative to plaintiff's employment.

The Valenzuela Connection

As noted above, Debbie D'Aurizio's one-page declaration adopted the specifics set forth in the amended complaint. A1413. In the amended complaint, Valenzuela is described as apologizing to Debbie D'Aurizio "for his pledge to terminate 'Al': 'Debbie, I'm sorry for what I'm about to do. . . ." Despite Debbie's warning, "Frankie you'd better do the right thing up there," Valenzuela cast an affirmative vote to terminate plaintiff, abstaining on all other substantive votes at that meeting. A37-38. Following the vote, Valenzuela admitted, "I had no choice." A38. These revelations not only show Valenzuela's culpable state of mind, but also constitute party admissions confirming the fact that plaintiff's termination on "budgetary" grounds, indeed, were false.

Summary of the Facts

Quite apart from the legal maxim that facts and inferences should be liberally construed in favor of a party opposing dismissal, these detailed and specific facts were totally unrefuted in the record. Not a single defendant filed any affidavit worthy of evidential value sufficient to undermine the facts plaintiff has properly put into evidence. In sum, the credible evidence and all inferences favorable to plaintiff show that:

1. Plaintiff ran in the November 1991 elections under an Independent candidacy.

2. Plaintiff's former Republican acquaintances sought to discourage him from doing so.

3. When he did not accede, they threatened to retaliate against him.

4. When this did not stop him, they planned, well before April 1992, to "get rid of Al" and arranged for former Board member Linda Sherwood to pack a sham "budget" to eliminate him.

5. Before their packing, the proposed budget actually contemplated an increase in custodial salary line item 610 for the 1992-93 year -- the year of the purported budget cuts.

6. Defendants then caused Councilperson Spohn to draft the April 27, 1992, budget cut resolution, and packed the budget accordingly.

7. Having decided what to do, they then met at the Rotolo firm to decide how to implement it. They discussed appointing Valenzuela and holding a "public" vote, which would be witnessed by the public.

8. They gave plaintiff a notice that his job would be discussed, but there are no minutes showing any discussion. There is no question that closed-session minutes should have been produced.

9. In spite of the absence of any discussion in closed- session, and the fact that Valenzuela was appointed moments before his vote to terminate plaintiff, plaintiff was told he was duly terminated.

10. Since the newspaper accounts show that defendants have no explanation as to how $2 to $3 million worth of deficits were created -- none traceable to the custodial salary line item -- they would have no credibility before a trier of fact in any aspect of their budgetary management and understanding.

REASONS FOR GRANTING THE WRIT

Introduction

Petitioner's application for a writ of certiorari should be granted for the following reasons under Rule 10 of the Supreme Court Rules.

1. The Third Circuit has sanctioned a lower court's departure from the accepted and usual course of judicial proceedings, particularly under summary judgment procedures, as to call for an exercise of this Court's power of supervision. See Rule 10(a).

2. The Third Circuit has rendered a decision in conflict with the decisions of other United States court of appeals, which warrant this Court's direction. See Rule 10(a).

3. The Third Circuit has decided an important question of federal law which has not been, but should be, settled by this Court, viz., whether the McDonnel-Douglas proof methodology generally applies to a Section 1983 political-retaliation case. See Rule 10(c).

4. The Third Circuit has improperly created a new, "political vote privilege" as part of an advisory ruling in this case, and justifies the Court's supervisory review.

I. PETITIONER WAS DENIED FIFTH AMENDMENT DUE PROCESS AND SEVENTH AMENDMENT TRIAL BY JURY BECAUSE THE LOWER COURTS EGREGIOUSLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF AUTHORITY UNDER RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

A. The Lower Courts Departed from the Usual Course of Authority Under Rule 56

Rule 56 of the Federal Rules of Civil Procedure provides for summary judgment when there exists no genuine dispute as to any material fact. Fed, R. C.V.. P. 56. Nebraska v. Wyoming, 113 S. Ct. 1689, 1694 (1993). Whether a "genuine issue" is exists is a test parallel to the test under Rule 50(a) for a judgment

as a matter of law: there must be evidence upon which a jury could reasonably find in favor of the opponent. While a mere "scintilla" of evidence, or "colorable" evidence is insufficient to create a genuine issue so as to defeat a properly made summary judgment motion, a genuine issue of fact requires resolution by trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-52 (1986).

Whether a fact is "material" depends on the substantive law in issue. A fact is "material" if it potentially affects the outcome of the case. Conversely, disagreements about unnecessary or irrelevant facts are immaterial for purpose of a summary judgment motion. Id. 248. The moving party always carries the burden of persuasion that no material fact is subject to a genuine dispute. This burden is discharged by showing that there is an absence of evidence in support of the non-moving party's claims. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

In ruling on a summary judgment motion, the court's function is not to weigh the evidence or find the facts. Instead, the Court's role is narrowly limited to assessing the threshold issues whether a genuine issue exists as to the material facts so as to require a trial. Anderson, supra, at 249. In this task, the facts and all reasonable inferences must be drawn in favor of the non-moving party. Id. at 255; Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 456 (1992).

It is improper for the Court to weigh the credibility of a witness or other evidence in ruling on a motion for summary judgment. Evaluating credibility, weighing evidence, and drawing inferences from those are all functions reserved for the trier of fact. Anderson, supra, at 255. In the same vein, state- of-mind questions are rarely, if ever, appropriate for summary disposition because they are intertwined with credibility issues. Hutchinson v. Proxmire, 443 U.S. 111 (1979).

Rule 56(e) plainly states that the moving party "shall set forth such facts as would be admissible in evidence." In addition to presenting raw evidence, this basic burden is intertwined with the moving party's burden to provide a short and concise

statement as to the material facts which are, and which are not, in dispute, under Local Rule 12G.[2] This type of requirement has been strictly construed as part of the moving party's basic burden. E.g. Buchana v. Sherrill, 51 F.3d 227, 228-29 (10th Cir. 1995); Johnson v. Gudmundsson, 35 F.3d 1104, 1108 (7th Cir. 1994); Professional Programs Group v. Dep't of Commerce, 29 F.3d 1349, 1353 (9th Cir. 1994).

In the District of New Jersey, the Local Rules also provide that briefs are not filed with the court clerk's office, see L. C.V.. Rule 7.1(c)(4) (formerly Gen. R. 12C), and hence any evidentiary material appended to a brief may not be considered as evidence by the lower courts. Thus, while Docket entry 151 shows a Notice of Motion by defendant Smith, Don, there is no reference to any "memorandum of law" in the record. In contrast, where a moving party has at least filed a document called "affidavit," as defendants Nichols and Verdicchio did, see Docket entry 152-54, those became part of the record, although they are insufficient on their merits (as will be discussed below).

The first objection raised in plaintiff's his memorandum of law opposing defendants' motion specifically advised the district court that all defendants have failed to file a statement of material, undisputed facts under Local Rule 12G and Civil Rule 56. A1415. Plaintiff further observed that all defendants other than the Borough failed to specifically identify which of the counts in plaintiff's first amended complaint were being challenged. Id. While the Borough did file a 12G statement, it failed to file any admissible evidence on which a summary judgment could properly be supported. The Borough "filed" a certification annexing purported documentary evidence but was done through a lawyer certification, and hence relied on inadmissible hearsay materials not grounded on a competent witness' personal knowledge, as would be required at trial. Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1555 (10th Cir. 1995) (discussing the majority rule that precludes use of hearsay testimony).

---

[2] In 1997, Local Rule 12G was renumbered as 56.1 in accordance with Congressional mandate (P.L. 103-317).

The district court cited extensively to these inadmissible, non-evidentiary materials in violation of both Rule 56 and the Local Rules. See, e.g. the court's decision granting defendant Board of Education's motion to dismiss, at A1660-63 (where virtually no reference is made to any of plaintiff's extensive proofs).

Even more egregious is the lower court's total failure to characterize the facts and inferences in a light most favorable to the non-moving party, the plaintiff. For example, had the court found, as was required, that the Linda Sherwood "hit list," specifically targeting plaintiff by name, is construed together with defendant Valenzuela's admission to Debbie D'Aurizio, "I'm sorry for what I'm about to do," and the defendants' April and June 7 conspiracy meetings, where the Municipal Chairman, the Mayor and Councilman Albanese agreed "fire him," the lower courts had to deny summary judgment.

The lower court's errors go directly to the their understanding of the substantive framework of summary judgment law, and is not merely a misapplication of the properly-stated law or misconstruction of the facts.

Under F.R.E. 801, party admissions are specifically characterized as non-hearsay, and hence admissible for substantive purposes. Under F.R.E. 801(d)2)(E), co-conspirator admissions are binding on all members of the conspiracy, as was clearly the case here. See World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1474 (10th Cir. 1985), cert. denied, 474 U.S. 823 (1985). Any of the defendants could have filed a short and concise affidavit denying Killion's admissions, but chose to remain silent, and thereby adopted Killion's version of the conspiracy. See also F.R.E. 801(b)(2)(B) (adoptive admission in a non-conspiracy context).

Far from accepting the truth of plaintiff's evidence, the district court improperly conducted a cursory trial on the papers, and concluded that plaintiff's recollection account of what Killion had admitted to him, constituting the detailed facts set forth in the first amended complaint, is somehow less credible than

Killion's deposition testimony. See A1662-73. Such subjective selection of the facts, is plainly improper under Rule 56.

B. The Lower Courts Departed From The Usual Course of Section 1983 and First Amendment Authority

In the oft-cited seminal political-retaliation case, Elrod v. Burns, 427 U.S. 353, 353-63 (1979), this Court observed:

> Patronage practice is not new to American politics. It has existed at the federal level at least since the Presidency of Thomas Jefferson, although its populization and legitimation primarily occurred latter, in the presidency of Andrew Jackson. The practice is not unique to American Politics. It has been used in may European countries, and in darker times, it played a significant role in the Nazi rise to power in Germany and other totalitarian states. More recent times have witnessed a strong decline in its use, particularly with respect to public employment. Indeed, only a few discontent with the corruption and inefficiency of the patronage system of public employment eventuated n the Pendleton Act, the foundation of modern civil service. And on the state and local levels, merit systems have increasingly displaced the practice. This trend led the Court to observe in CSC v. Letter Carriers, 413 U.S. 548, 564 (1973), that "the judgment of Congress, the Executive, and the country appears to have been that partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly, election are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences.
>
> The cost of the practice of patronage is the restraint it places on freedoms of belief and association. In order to maintain their jobs, respondents were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic

> Party, contribute a portion of their wages to the Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, usually at the price of one of the first three alternatives. Regardless of the incumbent party's identity, Democratic or otherwise, the consequences for association and belief are the same. An individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job.
>
> Our concern with the impact of patronage on political belief and association does not occur in the abstract, for political belief and association constitute the core of those activities protected by the First Amendment. Regardless of the nature of the inducement, whether it be by the denial of public employment or, as in Board of Education v. Barnette, 319 U.S. 624 (1943).
>
> Patronage, therefore, to the extent it compels or restrains belief and association, is inimical to the process which undergirds our system of government and is "at war with the deeper traditions of democracy embodied in the First Amendment." Illinois State Employees Union v. Lewis, 473 F.2d, at 576. As such, the practice unavoidably confronts decisions by this Court either invalidating or recognizing as invalid government action that inhibits belief and association through the conditioning of public employment on political faith.

Employment decisions based on political affiliations are not disallowed under all circumstances. If political affiliation is necessary, such as for confidential or executive positions, and its uses are narrowly-tailored, then it is permissible. Id. at 363. Here, however, political motivations plainly exceeded the permissible limits because (1) plaintiff's job, as a custodian, has no bearing on his politics or any confidentiality concern, and hence was not an express or implied job criterion and (2) as defendants admitted below (by their failure to argue otherwise), and as state

law mandates, the board of education itself is to be a non-partisan, educational entity where political considerations have no propriety in connection with employment matters. Under these circumstances, conditioning a public employee's job hiring or retention on the basis that infringes the constitutional rights is plainly unlawful. Connick v. Myers, 461 U.S. 138, 142, (1983); Perry v. Sindermann, 408 U.S. 593, 597, (1972). It is the plainest violation of the First Amendment.

The First Amendment mandates that "Congress shall make no law . . . abridging the freedom of speech . . . or association. . . ." Cases clearly provide that this proscription applies to the states and their governmental units through the Fourteenth Amendment. Horn v. Kean, 796 F.2d 668, 671 (3d Cir. 1986) (en banc) (quoting Jacobellis v. Ohio, 378 U.S. 184, 195 (1964) (Black J. concurring)). The First and Fourteenth Amendments also protect an individual's right of association -- to choose or not to choose with whom to associate for the common advancement of political beliefs and ideas. Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973). See also Lyng v. International Union, UAW, 485 U.S. 360 (1988) (reviewing decisions in which the Court held that individual associational rights must be free from governmental interference). These rights are the most basic to a free society.

A violation is triggered when some form of state power is exercised in such a way as to limit an individual's exercise of such first amendment rights. Horn, supra at 672. Perez v. Cucci, 725 F.Supp. 209, 232 (D.N.J. 1989):

> To demonstrate that a state employer has violated the first amendment's guarantee of freedom of speech, the public employee must first show he engaged in protected conduct, that is, he must allow that his speech pertained to a matter of public concern. Rode, supra, at 1201. A determination of whether the speech at issue addresses a matter of public concern requires an examination of "the content, forum and context of a given statement, as revealed by the whole record." Id. (quoting Connick, supra,

> 461 U.S. at 148, 103 S.Ct. at 1691 (footnote omitted). If plaintiff demonstrates he engaged in protected conduct, then he must next show that the conduct "was a `substantial' or `motivating' factor in the employer's [personnel decision]. Rode, supra, at 1200.

Id. 725 F.Supp. 209, 233 (D.N.J. 1989).

Section 1983 provides that:

> Every person who, under the color of any statute, ordinance, regulation, custom or usage of any state...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

42 U.S.C. 1983.

To state a claim for relief under § 1983, the conduct complained of must have been (1) under committed by an individual or entity acting under the color of state law and (2) must have deprived the plaintiff of a right or privilege secured by the constitution or laws of the United States. West v. Atkins 487, 487 U.S. 42, 108 S.Ct. 2550, 2556 (1988); Parratt v. Taylor, 451 U.S. 527, 535 (1981); Colburn v. Upper Darby Twnshp, 838 F.2d 663, 667 (3rd Cir. 1985) cert. denied, 109 S.Ct. (1989); Riley v. Jeffes, 777 F.2d 143, 145 (3d Cir. 1985). A public employee acts "under color of state law" when he or she is exercising his responsibilities pursuant to state law. West, supra , 108 S.Ct. at 2256. These include personnel decisions within the governmental units, and those making the personnel decision. Id. Perez v. Cucci, 725 F.Supp. 209, 231 (D.N.J. 1989).

Had these principles been applied to the case, the courts below were compelled to hold that the "budgetary constraints" were a sham defense. Both Mayor Maresca and Board member De Bartolo told plaintiff that he would be retaliated unless he withdrew from the race. Under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the burden shifted to the defendants to proffer some admissible evidence, but the courts below

failed to recognize that the McDonnell Douglas framework applies. Failing to use the McDonnell Douglas methodology, and failing to articulate any other framework, the courts below sua sponte weighed credibility and held as a matter of law that the defendants did not violate Section 1983 and summarily terminated plaintiff's Seventh Amendment right to a trial by jury.

Under that approach, no political-retaliation case can ever proceed to a trial by jury. Such a systematic denial of a plaintiff's Seventh Amendment right is indefensible.

C. The Lower Courts Departed from the Usual Course of Authority Under the Section 1985 Statutory Framework

Section 1985(3) states in pertinent part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; [then there shall be a violation].

42 U.S.C. 1985(3) (emphasis added).

The courts below held that political Independents are not protected under this statute, but there is no case law to suggest that a class allegation, as such, is required. The Court's guidance is necessary to settle the correct rule of law in this context, so as to protect a known minority, Independents, from harm by either of the two larger political groups, the Republicans and Democrats, in cases of political retaliation.

D. The Lower Courts Departed from the Usual Course of Authority Under the Supplemental Jurisdiction Law and Effectively Invalidated an Act of Congress

The district court issued four separate summary decisions and orders, dated the same day, granting the moving defendants' motions for summary judgment. The court further dismissed the remainder of the case under the "pendent" jurisdiction doctrine, principally citing Tully v. Mott Supermarket, Inc.,. 540 F.2d 187,

195-96 (3d Cir. 1976), some twenty years old. That case has been "bad law" since 1990, when the supplemental jurisdiction statute, 28 U.S.C. 1367, was amended. The former concepts of "pendent" and "ancillary" jurisdiction have been subsumed under a single rubric of "supplemental" jurisdiction since the 1990 amendment of Section 1367. See MCI Telecom Corp. v. Teleconcepts, Inc., 71 F3 1086, 1102 (3d Cir. 1995). Although recent cases still borrow the pendent and ancillary concepts, these cases recognize the fundamental change in the doctrinal posture.

The pre-1990 statute provided that state claims shall be dismissed if federal claims are dismissed in the absence of "extraordinary circumstances." E.g. Lovell Mfg. v. Export- Import Bank of the United States, 843 F.2d 725 (3d Cir. 1988). This often resulted in dismissals of state claims on the eve of trial, because federal claims were dismissed. Precisely in order to remedy such harshness, Congress amended section 1367 in 1990. The statute now provides that the court "shall" assume supplemental jurisdiction as a general proposition; and when all federal claims are dismissed, the statute provides that the court "may" dismiss the state claims.

The courts below effectively overrode and rewrote an act of Congress by failing to apply discretion on a case-by-case basis, as Congress intended, see David D. Siegle, Practice Commentary to 28 U.S.C.A. 1367, at 829, 835-36 (West 1991). The decisions below markedly vary from the accepted and usual course of proceedings, and create inter-circuit conflicts, with various other circuits. E.g. Patel v. Penman, 103 F.3d 868 (9th Cir.) (applying discretion), cert. denied, 117 S.Ct. 1845 (1996), Shanaghan v. Cahill, 58 F.3d 106 (4th Cir. 1995); McLaurin v. Prater, 30 F.3d 982 (8th Cir. 1994). By refusing to do the very task the Act of Congress directs, the Third Circuit effectively undermines a valid act of Congress intended to preclude that very result.

E. The Lower Courts Departed from the Usual Course of Ruling only on the Basis of Evidence

All defendants other than Nichols and Verdicchio failed to proffer any admissible evidence, while Nichols and Verdicchio relied on cursory affidavits. The lower courts used inadmissible, literal "non-evidence" -- i.e., documentary materials merely attached to briefs, which are not filed in the district court record, and which by local rule do not constitute evidence -- and thereby departed egregiously from the accepted and usual course of summary judgment procedure where the proponent of a Rule 56 motion always carries the burden of persuasion. See supra, Sec. A.

The lower courts' failure to require competent, admissible evidence led to the petitioner's loss of his Fifth and Seventh Amendment rights. This Court's reversal is necessary and proper.

II PETITIONER WAS DENIED FIFTH AMENDMENT DUE PROCESS AND SEVENTH AMENDMENT TRIAL BY JURY BECAUSE THE LOWER COURTS FAILED TO APPLY PROPER PROOF METHODOLOGY IN THIS POLITICAL-RETALIATION CASE WHICH RESULTED IN DISMISSAL AND CREATED AN INTER-CIRCUIT CONFLICT

The lower courts' failure to use the evidentiary presumptions set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) was wrong and creates an inter-circuit conflict with the Eighth Circuit's case St. Mary's Honor Center v. Hicks, 970 F.2d 487, 490-91 (8th Cir. 1992), cert. granted, 509 U.S. 502 (1993) (reversing). In this Court's review of St. Mary's, footnote 1 states that "we shall assume that the *McDonnell Douglas* framework is fully applicable to racial- discrimination-in-employment claims under 42 U.S.C. 1983." The Court thereby approved the Eighth Circuit's use in that specific case, though reversing on the merits. The Court has yet to announce whether that proof methodology is to be applied generally to all Section 1983 cases.

There is no basis to believe that a political retaliation case is different from a racial-discrimination case. Since the lower courts' conspicuous failure to apply the McDonnell Douglas framework resulted in petitioner's loss of his case, i.e., a settled property right, petitioner has suffered a constitutional deprivation

which the Court should address by announcing a general rule of law that Section 1983 political-retaliation cases should follow the McDonnell Douglas proof methodology.

III PETITIONER WAS DENIED FIFTH AMENDMENT DUE PROCESS BECAUSE HE WAS PRECLUDED FROM OBTAINING RELEVANT EVIDENCE UNDER A NEW SO-CALLED "POLITICAL VOTE PRIVILEGE" IN THE LOWER COURTS' CONSTITUTIONALLY IMPERMISSIBLE ADVISORY OPINION, WHICH CONTRIBUTED TO THE DISMISSAL OF PETITIONER'S CASE

The Borough's Rule 30(b)(6) deposition representative and drafter of the April 27, 1992, Budget Resolution that ostensibly "terminated" plaintiff was councilperson Susan Spohn. Spohn refused to answer questions seeking the tenor of her votes at the April 1992 school board election where her Republican friends, defendants De Bartolo, Nichols and Carney prevailed. Spohn cited no reason for her refusal to testify -- certainly none that remotely suggested any fear of political retaliation or some other harm. Yet, the district court held that there was a "political vote privilege," and thereby effectively treated the school board elections as "political" and held as a matter of law that such votes could be shielded under a new "political vote privilege."

As initially submitted to Congress, Article V of the Federal Rules of Civil Procedure contained a specific provision in favor of a "political vote" privilege. See Proposed F.R.E. 507; Notes of Committee on The Judiciary, Senate Report No. 93- 1277 (hereinafter Senate Rep.), reprinted at 1977 U.S. Code & Cong. Admin. News 7051, 7058; Federal Trial Handbook 2d, § 51.23

Privileged Information. Congress, however, expressly rejected such a provision in favor of a general provision, now F.R.E. 501, under which the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis. Senate Rep. at 7053, 7059. See Trammel v. United States, 445 U.S. 40, 48 (1980).

There was some tension between the House and Senate versions of section 501 as to whether state or federal law should apply. See Senate Report, at 7058. While the Senate conference committee agreed with the House proposal to have the principles developed on a case-by-case basis, it was concerned about potential confusion stemming from the latter principle. Thus, the Senate explained:

> The formulation adopted by the House is pregnant with litigious mischief. The committee has, therefore, adopted what we believe will be a clearer and more practical guideline for determining when courts should respect State rules of privilege. Basically, it provides that in criminal and Federal question civil cases, federally evolved rules on privilege should apply since it is Federal policy which is being enforced.[3] [Footnote 16 goes: It is also intended that the Federal law of privileges should be applied with respect to pendent State law claims when they arise in a Federal question case.]

Senate Report at 7058-59 (emphasis added).

Thus, the Senate resolved the conflict by requiring that federal principles of privilege must exclusively govern in (1) pure federal-question cases and (2) mixed federal-question and supplemental[4] state claims, both of which arise under 28 U.S.C. § 1331. In contrast, in a pure state-law case, brought solely by diversity jurisdiction under § 1332, any issue of privilege is to be resolved under the law of the State whose decisional principles control the dispute under the standards set in Erie Ry. Co. v. Thompkins,

---

3

4

304 U.S. 64 (1938). See also Senate Report at 7053. in Jaffe v. Redmond, ___ U.S. ___, 116 S.Ct. 1923 (June 13 1996), the Court recognized a federal "psychotherapist privilege" under Rule 501 based on "reason and experience." In particular, the Court was strongly influenced "by the fact that all 50 States and the District of Columbia have enacted . . . some form of psychotherapist privilege." Id. At 1929.

In contrast, here, the lower courts created a new federal privilege based on the fact that a "political vote privilege" is recognized in less than a majority of states -- and certainly none for school board elections which are, as here, non-partisan. The Court has long held that a privilege is not to be lightly created. University of Pe[illegible]. v. EEOC, 493 U.S. 182 (1990); United States v. Nixon, 418 U.S. 683 (1974). Contrary to the Court's long-settled principles in Buckley v. Valeo, 424 U.S. 1, 74 (1976), the proponent of the privilege never even attempted to make a "specific showing of a reasonable probability that compelled disclosure would result in threats, harassment, or reprisals from government officials or private parties"; see also Local 1814, Int'l Longshoremen's Assn v. Waterfront Comm'n, 667 F.2d 267, 271-73 (2d Cir. 1981) (holding similarly); In re Grand Jury Proceedings, 776 F.2d 1099, 1103 (2d Cir. 1985) (holding that because the witness failed to show "the particularized harm" supporting the claimed First Amendment privilege, mere possibility of wire tapping is insufficient), but Spohn showed none. In the proceedings below, the proponent of the "political vote privilege" never even bothered to make even the slightest showing that the lack of privilege would result in some -- any -- harm.

Other circuits have held that in a civil rights action where the deliberative process of State or local officials is itself genuinely in dispute, privileges designed to shield that process from public scrutiny must yield to the overriding public policies expressed in the civil rights laws. Burka v. N.Y. City Transit Authority, 110 F.R.D. 660, 667 (S.D.N.Y. 1986); cf. Memorial Hospital v. Shadur, 664 F.2d 1058 (7th Cir. 1981) (per curiam) (confidential medical disciplinary proceedings, privileged under

State law, required to be disclosed in federal antitrust action alleging conspiracy); United States v. AT&T, 524 F.Supp. 1381, 1389-90 (D.D.C. 1981) (FCC staff members could be questioned about "thought processes" in administrative process, notwithstanding claim of privilege" where manipulation of agency decisions by staff was in issue in antitrust action); Grossman v. Shwarz, 125 F.R.D. 376, 381 (S.D.N.Y. 1989).

Article III of the Constitution prohibits advisory rulings. The Third Circuit's ruling is not only creates an inter-circuit conflict, but also constitutes an advisory opinion which is expressly prohibited under Article III.

IV PETITIONER WAS DENIED FIFTH AMENDMENT DUE PROCESS BECAUSE THE COURTS BELOW DISMISSED ALL DEFENDANTS WHEN ONLY SOME OF THEM MOVED FOR DISMISSAL

The only defendants who sought summary judgment were defendants Borough of Palisades Park, Board of Education and its members in their official capacity, Smith Don Alampi & D'Argenio, Mayor William Maresa and Councilman Paul Albanese, Thomas Toscano (who briefed only in the district court and did not argue in the court of appeals), Carmine Verdicchio and James Nichols. See district court docket sheet. All others -- including the Board members in their individual capacities -- did not move for dismissal. Despite this fact, the courts below sub silentio, gratuitously dismissed each and every defendant without notice or hearing. Such an incomprehensible result should be held per se unconstitutional under the Fifth Amendment.

CONCLUSION

For foregoing reasons, a writ of certiorari should issue to the Court of Appeals for the Third Circuit in this matter, reversing the dismissal below.

s/Michael S. Kimm
Counsel of Record for Petitioner

APR 2 1998

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEAL

THIRD CIRCUIT

NO. 97-5280

ALBERT D'AURIZIO,

Appellant

v.

BOROUGH OF PALISADES PARK; BOARD OF EDUCATION OF PALISADES PARK; WILLIAM MARESCA, individually and as Mayor of Palisades Park; PAUL ALBANESE, individually and as member of the Borough Council; MICHAEL DEBARTOLO, individually and as a member of the Board of Education; VIRGINIA DEBARTOLO, individually and as a Borough official; MARY BETH COTTRELL, individually and as a member of the Board of Education; ROBERT CARNEY, individually and as a member of the Board of Education; CAROL KILLION, individually and as a member of the Board of Education; FRANCIS VALENZUELA, individually and as a member of the Board of Education; DAVID EICHENHOLTZ, individually and as an officer of the Board of Education; THOMAS TUSCANO, individually and as a member of the Palisades Park Republican Club; SUSAN GIACOBONE, individually and as an executive member of the Palisades Park Republican Party; CARMINE VERDICCHIO, individually and as Lead Custodian of the Board of Education;

JAMES NICHOLS, individually and as an Officer of the Board of Education; MATTHEW NICHOLS, individually and as a member of the Board of Education; GEORGE FASCIANO, individually and as Superintendent of Board of Education; PETER MAROSE, individually and as a member of Board of Education; SMITH, DON, ALAMPI & D'ARGENIO, individually and as counsel for the Board of Education

On Appeal from the United States District Court for the-
District of New Jersey
D.C. No. 93-cv-04417
District Judge: Hon. Joseph A. Greenaway

Submitted Pursuant to Third Circuit LAR 34.1(a)
March 26, 1998
Before: Mansmann, Roth and McKee, Circuit Judges

PER CURIAM:

Plaintiff appeals from the district court's grant of summary judgment in favor of defendants, and against the plaintiff in this action under 42 U.S.C.A. § 1983, and various state laws. We will affirm.

I.

The facts surrounding this appeal are well known to the parties and need not be reiterated here. Plaintiff makes numerous allegations of violations of his civil rights, by the Borough of Palisades Park Board of Education, various individuals who either serve on, or are employed by, the Board of Education, and public officials within the Borough. The crux

of D'Aurizio's claims however is his allegation that he was fired as a public employee because of his political affiliations and political activity. In order to prevail, he must show that his political affiliation was a substantial or motivating factor in his discharge. Laskaris v. Thornburgh, 733 F.2d 260 (3d Cir. 1984). We believe that the thoughtful and thorough opinion of the district court adequately and correctly analyzed each of Mr. D'Aurizio's claims and we will affirm the order of the district court substantially for the reasons set forth by the district court.

(Footnotes Trail Opinion)

Albert D'AURIZIO, Plaintiff,
v.
PALISADES PARK, et al., Defendants.

Civil No. 93-4417(JAG).

United States District Court,
D. New Jersey.

April 29, 1997.

*380 Sharon Handrock Moore, Gebbardt & Kiefer, P.C., Clinton, NJ, for Borough of Palisades Park.

Joseph J. Rotolo, Hackensack, NJ, for William Maresca, Paul Albanese.

Donald L. Crowley, Methfessel & Werbel, P.C., Rahway, NJ, for Board of Education of Palisades Park.

Frank M. O'Shea, Shapeze & McLaughlin, Englewood Cliffs, NJ, for David Eichenholtz.

Dennis J. Oury, Oury & Mizdol, Hackensack, NJ, for Thomas Tuscano, George Fasciano.

Virginia De Bartolo, Palisades Park, pro se.

Susan Giacobone, Palisades Park, pro se.

Scott G. Sproviero, Sinisi, Van Dam & Sproviero, Paramus, NJ, for Carmine Verdicchio, James Nichols.

John Paxton, Melli & Wright, Paramus, NJ, for Smith, Don, Alampi & D'Argenio.

Matthew Nicholas, Palisades Park, NJ, pro se.

Peter Marose, Harrington Park, NJ, pro se.

Mary Beth Cottrell, Palisades Park, NJ, pro se.

Robert Carney, Palisades Park, NJ, pro se.

Francis Valenzuela, Palisades Park, NJ, pro se.

Michael DeBartolo, Palisades Park, NJ, pro se.

Carol Killion, Palisades Park, NJ, pro se.

OPINION

GREENAWAY, District Judge.

This matter comes before the Court on the motion to dismiss, or alternatively for summary judgment, of Oury & Mizdol, P.C., attorneys for defendants Thomas Tuscano and George Fasciano. Because both parties present extrinsic material, the Court will treat this motion as one for summary judgment pursuant to Fed.R.Civ.P. 56.

PRELIMINARY STATEMENT

Plaintiff Albert D'Aurizio ("D'Aurizio"), and his wife Debbie, are members of a large and politically active family in the Borough of Palisades Park (the "Borough"). For years, the D'Aurizios participated in local Republican and school board politics. D'Aurizio's sister-in-law, Carol Killion (one of the defendants in this case), was president of the Palisades Park Board of Education (hereinafter, the "Board"). All of the defendants in this case are individuals D'Aurizio knows through his involvement in local politics; they include William Maresca, the Republican Mayor of the Borough between 1991 and November 1995, and various members of the Board and the Borough Council. In short, D'Aurizio's claims against the defendants stem from his belief that because he ran for a seat on the Council in 1991 as an independent, as opposed to a Republican candidate, the defendants--all, except for one, who are affiliated with the Republican party--participated in a conspiracy to fire him from his *381 Board-appointed position as a school custodian. In addition, D'Aurizio claims that subsequent to the elimination of his custodial position in June 1992, defendants continued their conspiracy against him by ensuring that the Board did not place his name on the part-time custodial roster in December 1992, thereby precluding him from exercising his alleged right of first refusal.

FACTS

Defendant George Fasciano ("Fasciano") was the Palisades Park Superintendent of Schools from approximately 1990 through November 1992. [FN1] As Superintendent, Fasciano did not vote on any action taken by the Board but he could make recommendations to the Board. Defendant Thomas J.

Tuscano ("Tuscano") is, and was at all relevant times, the Republican Municipal Chairman in Palisades Park. Tuscano is not a public official. His position as Republican Municipal Chairman requires him only to conduct the Palisades Park County Committee meetings. Ex. D. [FN2]

D'Aurizio's Candidacy

In April 1991, D'Aurizio, a former Republican, announced his candidacy as an independent candidate for a seat on the Council. In late May or early June 1991, the Board hired D'Aurizio as a part-time custodian. In August 1991, the Board decided, by vote, to make D'Aurizio a full-time custodian. In November 1991, D'Aurizio ran for Council against the Republican ticket and lost. D'Aurizio's alleges that his campaign caused a division among the local Republicans. Amended Complaint ¶ 27.

1992-1993 School Budget

In approximately December 1991, the budget process for the Borough's 1992-1993 school year began. On February 4, 1992, the Board met to discuss preliminary cuts to the budget; these cuts included the elimination of one custodial position (a $30,000 cut) and two maintenance positions (a $60,000 cut). Sherwood Dep., at 174-75. [FN3]

Fasciano testified at his deposition that he objected to the Board's proposed cuts to the budget--i.e., the elimination of one custodial and two maintenance positions. Ex. A, at 204-05. Ms. Killion confirmed Fasciano's testimony, stating that Mr. Fasciano "did not recommend it [the cuts]." Ex. L, Killion (5/26/95) Dep., at 546. Ms. Killion also testified that Mr. Tuscano did not give her "any inkling of anything"--i.e.,

as to whether he supported the proposed cuts to the school budget. Ex. I.

On March 17, 1992, the Board presented its 1992-1993 school budget--with the proposed cuts--at a public hearing. Eichenholtz Dep., at 247. [FN4] On or about April 7, 1992, the Borough voters defeated the school budget. Killion Dep., at 586-87. [FN5] As a result, on April 22 and April 26, 1992, the Board, the Mayor (Maresca) and the Council met to review the budget and to determine if they could make any other cuts. [FN6] These were open meetings mandated by New Jersey State statute and recited in the Council's School Board Budget Resolution, passed on April 27, 1992 ("hereinafter, the 'April 27 *382 Budget Resolution' "). [FN7]

Conspiracy Meetings

D'Aurizio alleges that in addition to the two mandated meetings, members of the "Republican majority" from the Borough secretly met in April, [FN8] and again on June 9, 1992, to conspire to eliminate D'Aurizio's position as a school custodian, i.e., in retaliation for his 1991 independent candidacy for Council. [FN9] Amended Complaint ¶ 32. Specifically, D'Aurizio claims that Michael DeBartolo, [FN10] the campaign manager for D'Aurizio's Republican opponent in the November 1991 election, stated at the secret meeting in April: "We're getting rid of Al [D'Aurizio] because he ran against us." Id. D'Aurizio adds that all the other Republican members of the Board tacitly agreed with DeBartolo's suggestion "by nodding, or other acts showing ratification of the conspiracy proposal." Id.

However, D'Aurizio testified at his deposition that his basis for believing that the defendants secretly met, both in April

and in June, came only from alleged conversations he had with Carol Killion (his sister-in-law), see D'Aurizio Dep., at 127-28, and defendant Peter Marose, a Democratic member of the Board. Id. at 135-36. Indeed, D'Aurizio admitted at his deposition that other than what he could "surmise" from these two conversations, he had no other knowledge of the alleged secret meeting, which he believes occurred some time in April. Id. at 136 & 139-40. In addition, Ms. Killion stated at her deposition that the April meeting was "an open meeting and anyone could have come." Killion Dep., at 105-06. Moreover, when questioned about his conversation with Ms. Killion regarding the alleged secret meeting in April, D'Aurizio responded: "I do not recall exactly how we found out from her [Ms. Killion]." D'Aurizio Dep., at 127-28.

Ms. Killion also admitted at her deposition that the June meeting was an open Republican meeting, held at the law offices of Rotolo & Rotolo, to discuss the vacant seat on the Board. Killion Dep., at 178-86. In addition, Ms. Killion testified that D'Aurizio's name was not even mentioned during this June meeting other than in a private, side conversation she (Ms. Killion) had with Mr. Albanese, the content of which was: "Paul, Paul [Albanese], come on, this is my brother-in-law", to which Mr. Albanese allegedly responded "well, fire them all." Id. at 101. Tuscano testified that he attended the June 7 meeting but that he did not get there until it was just "breaking up." Ex. F, Tuscano Dep., at 186. [FN11]

D'Aurizio's Termination

On June 2, 1992, the Board informed D'Aurizio by letter that his job would be discussed at the June 9 meeting. D'Aurizio Dec. ¶ 21. On June 9, 1992, the Board voted to eliminate one custodian and two maintenance positions. In short,

D'Aurizio's custodian job was officially terminated. Id. However, there is no evidence that Fasciano concurred in this decision; in fact, defendants provide the Court with Ms. Killion's deposition testimony, which indicates just the opposite, that "Mr. Fasciano knew that Al [D'Aurizio] was *383 losing his job or was going to lose his job, and he just said he would try to help him any way that he could." Ex. M, Killion (5/26/95) Dep.. at 645.

The Complaint

On October 4, 1993, D'Aurizio filed his initial Complaint in this case. On February 14, 1994, D'Aurizio filed an Amended Complaint, seeking relief against the defendants for: (1) conspiring to violate his First Amendment rights of freedom of association, freedom of speech, freedom to vote and his Fourteenth Amendment rights to equal protection and procedural and substantive due process; (2) violating his First Amendment rights of freedom of association, freedom of speech, freedom to vote and his Fourteenth Amendment rights to equal protection and procedural and substantive due process; (3) conspiring to violate 42 U.S.C. § § 1983 and 1985; (4) violating 42 U.S.C. § § 1983, 1985 and 1986; (5) violating New Jersey's Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 to:5-42; and (6) tortious interference.

DISCUSSION

Fed.R.Civ.P. 56(c) provides for summary judgment when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)

; Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1366 (3d Cir.1996) . Once the moving party has satisfied its initial burden, the party opposing the motion must establish that a genuine issue as to a material fact exists. Jersey Cent. Power & Light Co. v. Lacey Township, 772 F.2d 1103, 1109 (3d Cir.1985) . The party opposing the motion for summary judgment cannot rest on mere allegations and must instead present actual evidence that creates a genuine issue as to a material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 243, 106 S.Ct. 2505, 2507, 91 L.Ed.2d 202 (1986) ; Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1130-31 (3d Cir.1995) ; Sound Ship Bldg. Corp. v. Bethlehem Steel Co., 533 F.2d 96, 99 (3d Cir.) , cert. denied, 429 U.S. 860, 97 S.Ct. 161, 50 L.Ed.2d 137 (1976) .

42 U.S.C. § 1983

[1] To state a claim under 42 U.S.C. § 1983 ("section 1983"), a plaintiff must allege two elements: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that this conduct deprived plaintiff of rights, privileges or immunities secured by the U.S. Constitution or laws of the United States. [FN12] See West v. Atkins, 487 U.S. 42, 48-49, 108 S.Ct. 2250, 2254-55, 101 L.Ed.2d 40 (1988) ; Shaw by Strain v. Strackhouse, 920 F.2d 1135, 1142 (3d Cir.1990) ; McArdle v. Tronetti, 769 F.Supp. 188, 190 (W.D.Pa.1991) , aff'd. 961 F.2d 1083 (3d Cir.1992) .

i. Color of State Law

[2][3][4] In most contexts, the section 1983 "acting under color of state law" inquiry is identical to the "state action" requirement under the Fourteenth Amendment. Groman v. Township of Manalapan, 47 F.3d 628, 638 n. 15 (3d

Cir.1995) (citing Robison v. Canterbury Village, Inc., 848 F.2d 424, 427 n. 3 (3d Cir.1988)). Thus, "[w]here the actors are not state or municipal officials, but are private individuals or associations ... their activity can nevertheless be deemed to be under color of law." Id. at 638. In short, a private party is converted into a state actor where "he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." Lugar v. Edmondson Oil Company. Inc., 457 U.S. 922, 937, 102 S.Ct. 2744, 2754, *384 73 L.Ed.2d 482 (1982) (1982). [FN13] However, a private action "is not converted into one under color of state law merely by some tenuous connection to the state action. The issue is not whether the state was involved in some way in the relevant events but whether the action taken can be fairly attributed to the state itself." Groman, 47 F.3d at 638-39 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 95 S.Ct. 449, 454, 42 L.Ed.2d 477 (1974)). Moreover, because the "under color of state law" requirement is part of the prima facie case for a section 1983 claim, "the plaintiff bears the burden of proof on that issue." Id. at 638 (citing West v. Atkins, 487 U.S. 42, 48, 108 S.Ct. 2250, 2254-55, 101 L.Ed.2d 40 (1988)).

FN13. See also Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 621-22, 111 S.Ct. 2077, 2083, 114 L.Ed.2d 660 (1991) ("in determining whether a particular course of conduct is governmental in character, it is relevant to examine ... the extent to which the actor relies on governmental assistance and benefits; ... whether the actor is performing a traditional governmental function; ... and whether the inquiry caused is aggravated in a unique way by the incidents of governmental authority.")

[5] Tuscano is not a public official. His position as the Republican Municipal Chairman requires him only to conduct meetings of the Palisades Park County Committee. Moreover, D'Aurizio has not established that Tuscano's private party status should be converted into that of a state actor; in short, there is no evidence that Tuscano acted "together with or has obtained significant aid from state officials[.]" See Lugar, 457 U.S. at 937, 102 S.Ct. at 2754. Indeed, according to Ms. Killion, Tuscano "never gave [her] an inkling of anything"--i.e., his views on whether or not the Board should adopt the proposed cuts to the budget. Ex. I. In addition, D'Aurizio does not even allege that Tuscano was at the secret meeting held in April; and, as to the June 7 meeting, Tuscano testified that he did not even get there until after it had broken up. Accordingly, D'Aurizio alleges no facts which convert Tuscano, a private party, into an official acting "under color of state law." Therefore, D'Aurizio's section 1983 claim against Tuscano is dismissed.

ii. Discrimination based on Political Association

[6][7] To make out a prima facie case of discrimination based on political association--i.e., pursuant to the First amendment--a public employee must prove:
(1) that the employee works for a public agency in a position that does not require a political affiliation, (2) that the employee maintained an affiliation with a political party, and (3) that the employee's political affiliation was a substantial or motivating factor in the adverse employment decision. Robertson v. Fiore, 62 F.3d 596, 599 (3d Cir.1995) (citing Laskaris v. Thornburgh, 733 F.2d 260, 265 (3d Cir.) , cert. denied, 469 U.S. 886, 105 S.Ct. 260, 83 L.Ed.2d 196 (1984) ; Perez v. Cucci, 725 F.Supp. 209, 238-39 (D.N.J.1989) , aff'd,

898 F.2d 139 (3d Cir.1990)). [FN14] If the plaintiff-employee is able to show his political association is a substantial or motivating factor in the adverse employment decision, the burden shifts to the employer to show "by a preponderance of the evidence that it would have reached the same decision ... even in the absence of the protected conduct." Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977) ; Robertson, 62 F.3d at 599 (citations omitted); Raniero v. Antun, 943 F.Supp. 413, 423 (D.N.J.1996) (citations omitted).

[8] In this case, D'Aurizio contends that he was fired from his custodian position because of his political association. [FN15] However, D'Aurizio's evidence amounts to no more *385 than conclusory allegations that he spoke to two individuals, one of whom is his sister-in-law, who told him the defendants secretly met and conspired to eliminate his custodian position with the Board.

[9] Moreover, assuming arguendo that D'Aurizio was to make out a prima facie case of discrimination, defendants provide the Court with ample documentary and testimonial evidence demonstrating that the Borough's April 27 Budget Resolution (which eliminated D'Aurizio's job), as well as the Board's prior cuts to the budget, were motivated by nothing more than a legitimately perceived need to reduce the school budget. In addition, D'Aurizio does not even allege that either Fasciano or Tuscano attended the secret meeting in April. D'Aurizio does allege that Tuscano attended the June 7 meeting; however, this evidence is nullified by Tuscano's testimony that he arrived at the June 7 meeting when the meeting was just "breaking up." Ex. F, Tuscano Dep., at 186. Furthermore, as Superintendent of the Schools, Fasciano did not vote on any of the Board's actions. Indeed, Fasciano

testified at his deposition that he objected to the Board's proposed cuts to the budget, i.e., the elimination of one custodial and two maintenance positions. Ex. A, at 204- 05. Ms. Killion confirmed Fasciano's testimony, stating that Mr. Fasciano "did not recommend it [the cut]." Ex. L, Killion (5/26/95) Dep., at 546. Ms. Killion also testified that Mr. Tuscano did not give her "any inkling of anything" as to whether he supported the proposed cuts to the school budget. Ex. I.

Accordingly, D'Aurizio has failed to show that his 1991 independent candidacy for Council--and thus his political association--was a "substantial or motivating factor" in the Board's decision to eliminate his custodian position; moreover, even if he had proven discrimination by the Board, D'Aurizio provides no evidence that the defendants, Fasciano and Tuscano, even participated in the decision to eliminate his job. Therefore, D'Aurizio's First Amendment claim, and consequently his section 1983 claim, against defendants Fasciano and Tuscano is dismissed. [FN16]

42 U.S.C. § 1985

[10] To establish a claim in violation of the first clause [FN17] of 42 U.S.C. § 1985(3) ("section 1985(3)"), the plaintiff must allege and prove four elements:

(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his

person or property or deprived of any right or privilege of a citizen of the United States.

Deblasio v. Zoning Bd. of Adjustment for the Township of West Amwell, 820 F.Supp. 876, 885 (D.N.J.1993) (quoting Wagner v. Township of Harmar, 651 F.Supp. 1286 (W.D.Pa.) , affd, 826 F.2d 1058 (3d Cir.1987)) (citing United Bhd. of Carpenters & Joiners of America, Local 610, AFL-CIO, et al. v. Scott et al., 463 U.S. 825, 828-29, 103 S.Ct. 3352, 3355-56, 77 L.Ed.2d 1049 (1983)). Courts have construed the second element to require "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 268-69, 113 S.Ct. 753, 759, 122 L.Ed.2d 34 (1993) (citing Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971)); Pratt v. Thornburgh, 807 F.2d 355, 357 (3d Cir.1986) . Thus, for example, an allegation by a plaintiff "that he was discriminated against because he was not a political insider ... fails to allege that he is part of any protected class which would bring him *386 under the protection of § 1985." Deblasio, 820 F.Supp. at 885.

[11] In this case, even if D'Aurizio could prove the conspiracy and injury elements of his section 1985(3) claim against the defendants, he does not allege that the defendants' actions were motivated by "racial or other class-based invidiously discriminatory animus." Rather, here D'Aurizio is merely claiming that the defendants conspired against him, individually, because of his political association.

Accordingly, D'Aurizio's section 1985(3) claim against the defendants is dismissed.

42 U.S.C. § 1986

[12][13] 42 U.S.C. § 1986 ("section 1986") provides a damages remedy against an individual who fails to prevent a section 1985(3) conspiracy. Skadegaard v. Farrell, 578 F.Supp. 1209, 1221 n. 9 (D.N.J.1984) . Thus, all claims under section 1986 are derivative in nature, requiring a valid underlying section 1985(3) claim. Id. at 1221 (citing Hauptmann v. Wilentz, 570 F.Supp. 351, 387 (D.N.J.1983)); see also Bowman v. Bank of Delaware, 666 F.Supp. 63, 64 (D.Del.1987) ("[i]f the complaint does not state a § 1985(3) cause of action, then any § 1986 claim must fail as well.") In addition, there is a one year statute of limitations for section 1986 claims. Marino v. Bowers, 483 F.Supp. 765, 769 (E.D.Pa.1980) , aff'd, 657 F.2d 1363 (3d Cir.1981) .

Accordingly, D'Aurizio's section 1986 claim in this case fails both because (1) he does not state a valid section 1985(3) claim against the defendants; and (2) he waited for more than one year to file his claim. [FN18]

Pendent Jurisdiction

This Court cannot exercise pendent jurisdiction over state law claims unless, at a minimum, there is:

a federal claim of sufficient substance to confer subject matter jurisdiction on the court. The substantiality of the federal claim is ordinarily determined on the basis of the pleadings. If it appears that the federal claim is subject to dismissal under F.R. Civ. P. 12(b)(6) or could be disposed of on a motion for summary judgment under F.R. Civ. P. 56, then the court should ordinarily refrain from exercising jurisdiction in the absence of extraordinary circumstances.

Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 195-96 (3d Cir.1976) (citations omitted); see also University of Maryland at Baltimore v. Peat, Marwick, Main & Company, 996 F.2d 1534, 1540 (3d Cir.1993) .

[14] D'Aurizio alleges state law claims--tortious interference and LAD violations--against the moving defendants. However, D'Aurizio's federal civil rights claims are subject to dismissal by this Court and there are no "extraordinary circumstances" justifying retention of pendent jurisdiction over the state law claims in this case.

Accordingly, defendants' summary judgment motion for an Order of dismissal of plaintiff D'Aurizio's Amended Complaint as to defendants Thomas Tuscano and George Fasciano is hereby granted.

ORDER

This matter having been opened to the Court by Oury & Mizdol, P.C., attorneys for defendants Thomas Tuscano and George Fasciano, and the Court having considered the submissions of the parties, and good cause appearing,

IT IS on this 28th day of April, 1997

ORDERED that defendants' motion for summary judgment, pursuant to Fed.R.Civ.P. 56(c), for an Order of dismissal of plaintiff's Amended Complaint with respect to defendants Thomas Tuscano and George Fasciano be and hereby is granted; and

IT IS FURTHER ORDERED that a copy of this Order be served on all parties within seven (7) days of the date of this Order.

FOOTNOTES

FN1. The parties do not specify the exact dates when Fasciano was Superintendent but they do not dispute that he held this position during 1991 and that he left some time prior to November 1992. Accordingly, it is undisputed that Fasciano left before the Board implemented its part-time custodial list.

FN2. References in the form "Ex.---" are to the exhibits attached to the moving defendants' brief in support of this motion.

FN3. Deposition of Linda A. Sherwood, sworn to on June 13, 1995.

FN4. Deposition of David Eichenholtz, sworn to on January 4, 1996.

FN5. Deposition of Carol Killion, sworn to on May 23, 1995.

FN6. Pursuant to New Jersey State statutory law, school budgets in New Jersey are created in the following way: (1) the school Board develops a budget, N.J.S.A. 18A:22-32; (2) the dollar amount needed to support the budget is then presented to the voters, N.J.S.A. 18A:22-33; and (3) if the

budget passes, the process ends but if it is defeated the Mayor and the Council are mandated to examine the budget and to determine if there are areas where cuts can be made. N.J.S.A. 18A:22-37.

FN7. A copy of the April 27 Resolution is attached as Exhibit D to the summary judgment motion filed by Methfessel & Werbel, Esqs., on behalf of the Board defendants, in their official capacities. On page 1 of the initial papers filed in support of the instant motion, the attorneys for Tuscano and Fasciano specifically incorporate the brief filed by Methfessel & Werbel on behalf of the Board defendants.

FN8. D'Aurizio does not provide the exact date of the alleged secret meeting in April.

FN9. D'Aurizio alleges that Maresca, Republican Board members--Michael DeBartolo, Mathew Nichols, Robert Carney, Ms. Killion, and Mary Beth Cottrell, and Democrats--Fred Knopp, John Madisench and Chris Brown, attended the secret meeting in April. D'Aurizio further alleges that the same people attended the secret meeting in June, along with Tuscano and Republicans, Virginia DeBartolo (Borough official), Paul Albanese (Borough Council) and Susan Giacobone (executive member of Palisades Park Republican Party). D'Aurizio also claims that the secret meeting in June was held in the conference room of a local law firm, Rotolo & Rotolo.

FN10. Mr. DeBartolo is also a defendant in this case.

FN11. D'Aurizio does not allege that either Fasciano or Tuscano attended the secret meeting in April. He does, however, allege that Tuscano attended the June meeting but

Tuscano testified he did not get to the meeting until after it was over.

FN12. Specifically, 42 U.S.C. § 1983 provides that:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

FN14. "[A]n employee can show a protected political affiliation even if he or she is a member of the same political party as his or her employer so long as the employer and employee are members of competing identifiable factions within that same party." Christy v. Pennsylvania Turnpike Commission, 904 F.Supp. 427, 430 n. 3 (E.D.Pa.1995) .

FN15. Specifically, D'Aurizio's section 1983 claim stems from his allegations that the defendants violated his First and Fourteenth Amendment rights by discriminating against him because of his political association.

FN16. D'Aurizio's has also failed to present sufficient evidence to substantiate his Fourteenth and Fifteenth Amendment claims against the defendants. D'Aurizio's section 1983 claim, premised on his Fourteenth and Fifteenth Amendment claims, is therefore also dismissed.

FN17. The first clause of section 1985(3) states, in pertinent part: "If two or more persons ... conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws[.]"

FN18. D'Aurizio's section 1986 claim accrued no later than June 9, 1992, when he lost his custodian position with the Board. D'Aurizio filed his initial Complaint on October 4, 1993, more than one year later.

(Footnotes Trail Opinion)

not for publication

Albert D'AURIZIO, Plaintiff,
v.
PALISADES PARK, et al., Defendants.

Civil No. 93-4417(JAG).

United States District Court,
D. New Jersey.

April 29, 1997.

JOSEPH A. GREENAWAY JR., District Judge,

This matter comes before the court on the joint motion for summary judgment of Gebhardt and Kiefer, P.C., attorneys for defendant Borough of Palisades Park, and Joseph J. Rotolo, Esq., attorney for defendants Paul Albanese and William Maresca.

PRELIMINARY STATEMENT

.Plaintiff Albert D'Aurizio ("D') Aurizio"), and his wife Debbie, are members of a large and politically active family in the Borough of Palisades Park (the "Borough"). For years, the D'Aurizios participated in local Republican and school board politics. D'Aurizio's sister in law Carol Killion (one of the defendants in this case), was president of the Palisades Park Board of Education (herein after, the "Board"). The other defendants are individuals D'Aurizio knows through his involvement in local politics. In short,

D'Aurizio contends that because he ran for a seat on the Council in 1991 as an independent, as opposed to a Republican candidate, the defendants all, except for one, who are affiliated with the Republican party participated in a conspiracy to fire him from his Board-appointed position as a school custodian.

FACTS

Defendant Borough is a borough governed by a Mayor and a six member Council. Defendant Paul Albanese ("Albanese") was a Republican member of the Borough Council (the "Council") from 1991 until approximately November 1995.[1] Defendant William Maresca ("Maresca") was the Republican Mayor of the Borough between 1991 and November 1995, when he resigned. The Board, also a defendant in this case, is a separate, elected body, with the power to hire and fire its own employees.[2]

D'Aurizio's Candidacy

In April 1991, D'Aurizio, a former Republican, announced his candidacy as an independent candidate for a seat on the Council. In late May or early June 1991, the Board hired D'Aurizio as a part-time custodian In August 1991, the Board decided, by vote, to make D'Aurizio a full-time custodian. In November 1991, D'Aurizio ran for Council against the Republican ticket and lost. D'Aurizio's alleges that his campaign caused a division among the local Republicans. Amended Complaint ¶ 27.

1992-1993 School Budget

The Borough's budget process for the 1992-1993 school year began in approximately December 1991 or January 1992. On February 4, 1992, the Board met to discuss

preliminary cuts to the budget; these cuts included the elimination of one custodial position ($30,000) and two maintenance positions ($60,000).See Colabella Certif. Ex. P, at 174-75.[3] On March 17, 1992, the Board presented its 1992-1993 school budget — with the proposed cuts — at a public hearing. Id. at Ex. O. On or about April 7, 1992, the Borough voters defeated the school budget. Id. at Ex. G. As a result, on April 22 and April 26, 1992, the Board, the Mayor (i.e., Maresca) and the Council met to review the budget and to determine if they could make any other cuts.[4] These were open meetings mandated by New Jersey State statute and recited in the Council's School Board Budget Resolution, passed on April 27, 1992 ("hereinafter, the "April 27 Budget Resolution"). Id. at G.

Conspiracy meetings

D'Aurizio alleges that in addition to the two mandated meetings, members of the "Republican majority" from the Borough secretly met in April [5], and again on June 9, 1992, to conspire to eliminate D'Aurizio's position as a school custodian, i.e., in retaliation for his 1991 independent candidacy for Council.[6] Amended Complaint ¶ 32. Specifically, D'Aurizio claims that Michael DeBartolo[7], the campaign manager for D'Aurizio's Republican opponent in the November 1991 election, stated at the secret meeting in April: "We're getting rid of Al [D'Aurizio] because he ran against us." Id. D'Aurizio adds that all the other Republican members of the Board tacitly agreed with Bartolo's suggestion "by nodding, or other acts showing ratification of the conspiracy proposal." Id.

However, D'Aurizio testified at his deposition that his basis for believing that the defendants secretly met, both in April and June, came only from alleged conversations he had with Carol Killion (his sister-in-law), see Colabella Certif., Ex. M, at 127-28, and defendant Peter Marose, a member of

the Board. Id. at 135-36. Indeed, D'Aurizio admitted at his deposition that other than what he could "surmise" from these two conversations, he had no other knowledge of the alleged secret meeting, which he believes occurred some time in April. Id. at 136 & 139-40. In addition, Ms. Killion at her deposition that the April meeting was "an open meeting and anyone could have come "Id. at Ex. N, at 105-06. Moreover, when questioned about his conversation with Ms Killion regarding the alleged secret meeting in April, D'Aurizio responded: "I do not recall exactly how we found out from her [Ms. Killion]." Id. at Ex. M, at 127-28.

Ms. Killion also admitted at her deposition that the June meeting was an open Republican meeting, held to discuss the vacant seat on the Board, id. at Ex. N, at 178-86. In addition, Ms. Killion testified that D'Aurizio's name was not even mentioned during this June meeting other than in a private, side conversation she (Ms. Killion had with Mr. Albanese, the content of which was: "Paul, Paul [Albanese], come on, this is my brother-in-law", to which Mr. Albanese allegedly responded "well, fire them all." Id. at Ex. N, at 101.

D'Aurizio's Termination

On June 2, 1992, the Board informed D'Aurizio by letter that his job would be discussed at the June 9 meeting. D'Aurizio Dec. ¶ 21. On June 9, 1992. the Board voted to eliminate one custodian and two maintenance positions. In short, D'Aurizio 's custodian job was officially terminated. Id.

The Complaint

On October 4, 1993, D'Aurizio filed his initial Complaint in this case. On February 14. 1994, D'Aurizio filed an Amended Complaint, seeking relief against the defendants for: (1) conspiring to violate his First Amendment rights of

freedom of association, freedom of speech, freedom to vote and his Fourteenth Amendment rights to equal protection and procedural and substantive due process; (2) violating his First Amendment rights of freedom of association, freedom of speech, freedom to vote and his Fourteenth Amendment rights to equal protection and procedural and substantive due process; (3) conspiring to violate 42 U.S.C. §§ 1983 and 1985; (4) violating 42 U.S.C. §§ 1983, 1985 and 1986; (5) violating New Jersey's Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 to :5-42; and (6) tortious interference.

Fed. R. Civ. P. 56(c) provides for summary judgment when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U. S. 317 (1986); Orson. Inc. v. Miramax Film Corp., 79 F.3d 1358, 1366 (3d Cir. 1996). Once the moving party has satisfied its initial burden the party opposing the motion must establish that a genuine issue as to a material fact exists. Jersey Cent. Power & Light Co. v. Lacey Township, 772 F.2d 1103, 1109 (3d Cir. 1985). The party opposing the motion for summary judgment cannot rest on mere allegations and must instead present actual evidence that creates a genuine issue as to a material fact for trial. Anderson v. Liberty Lobby Inc., 477 U.S. 242,243(1986); Siegel Transfer. Inc. v. Carrier Express Inc., 54 F.3d 1125, 1130-31 (3d Cir. 1995); Sound Ship Bldg. Corp. v. Bethlehem Steel Co., 533 F 2d 96,99 (3d Cir. 1976).

42 U.S.C. Sec.1983

To state a claim under 42 U.S.C. § 1983 ("section 1983"), a plaintiff must allege two elements: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that this conduct deprived plaintiff of rights, privileges or immunities secured by the U.S.

Constitution or laws of the United States[8]. See West v.Atkins, 487 U.S. 42,48-49 (1988); Shaw by Strain v. Strackhouse, 920 F.2d 1135, 1142 (3d Cir. 1990); McArdle v. Tronetti 769 F. Supp. 188, 190 W.D. a. 1991), aff'd, 961 F.2d 1083 (3d Cir. 1992).

i. Respondeat superior liability

There is no respondeat superior liability under section 1983. Polk County v. Dodson, 454 U.S. 312, 325 (1981) (citing Monell v. New York City Dept. of Social Services,436 U.S. 658,694 (1978)); Fagan v. City of Vineland, 22 F.3d 1283, 1291 (3d Cir. 1994); Kneipp v Tedder, 95 F.3d 1199, 1211 (3d Cir. 1996). Thus, a local government entity "cannot be held liable solely because it employs a tortfeasor." Fagan, 22 F.3d at 1291. Indeed, a local government entity cannot be sued under section 1983 unless "the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury[.]" Monell,436 U.S. at 690 see also Fagan, 22 F.3d at 1291. For liability to attach, however, the municipal policy or custom at issue must be the actual cause of the alleged constitutional violation. City of Canto, Ohio v. Harris 489 U.S. 378, 391 (1989); see also Polk County, 454 U.S. at 326 (stating that the official policy must be "the moving force of the constitutional violation") (citations omitted); Kneipp 95 F.3d at 1213 (the government policy or custom must be "the proximate cause of the injuries sustained.")[9]

Therefore, because there is no respondeat superior liability under section 1983, D'Aurizio cannot maintain his section 1983 claim against defendant Borough, a municipal

entity. In addition, D'Aurizio cannot claim that the borough officially adopted or promulgated a policy or custom which caused his discharge because it was the Board not the Borough who terminated D'Aurizio's job. The only actual municipal actions D'Aurizio attributes to the Borough are (1) its participation in the April meetings — which were mandated by New Jersey State statute — and (2) its passage of the April 27 Budget Resolution. The parties do not dispute that D'Aurizio's custodian position was cut from the school budget. However, D'Aurizio does not contend that the passing of the April 27 Budget Resolution embodied a forbidden municipal policy.

Rather, D'Aurizio alleges that in addition to the two mandated meetings, Republican members of the Board, the Mayor and others , secretly met in April and June 1992, to conspire to eliminate his custodial position, in retaliation for his 1991 independent candidacy for Council. Amended Complaint ¶ 32. Specifically, D' Aurizio claims that Michael DeBartolo, the campaign manager for D'Aurizio's Republican opponent in the November 1991 election, stated at one of these secret meetings: "We're getting rid of Al [D'Aurizio] because he ran against us." Id. D'Aurizio adds that all the other Republican members of the Board tacitly agreed with DeBartolo's suggestion "by nodding, or other acts showing ratification of the conspiracy proposal." Id.

However, D'Aurizio testified at his deposition that his basis for believing that secret conspiracy meetings were held came only from alleged conversations he had with Ms. Killion (his sister-in-law), see Colabella Certif., Ex M, at 127-28, and Mr. Marose, a member of the Board. Id. at 135-36. Indeed, D'Aurizio admitted at his deposition that other than what he could "surmise" from these two conversations, he no other knowledge of the alleged secret conspiracy meeting in April. Id. at 139-40.In addition, Ms. Killion stated at her deposition that the April meeting was "an open meeting and anyone

could have come." Id. at Ex. N, at 105-06. Moreover, when D'Aurizio was specifically questioned about his conversation with Ms. Killion, regarding the allegedly secret meeting in April, D'Aurizio responded: "I do not recall exactly how we found out from her [Ms. Killion]." Id. at Ex. M, at 127-28.

Ms. Killion also stated at her deposition that the June meeting was an open Republican meeting, held to discuss the vacant seat on the Board, see id. at Ex. N, at 178-86. In addition, Ms. Killion testified that D'Aurizio's name was even not mentioned during this June meeting other than in a private, side conversation she (Ms. Killion) had with Mr. Albanese, the content of which was: "Paul, Paul [Albanese], come on, this is my brother-in-law", to which Mr. Albanese allegedly responded "well, fire them all Id. at Ex. N, at 101.

In short, D'Aurizio fails to provide the Court with sufficient evidence — i.e., creating a genuine issue as to a material fact— to support a claim that the Borough officially adopted an unconstitutional policy to terminate D' Aurizio because of his political association.

Accordingly, D'Aurizio's section 1983 claim against the Borough is dismissed.

ii. <u>Discrimination based on political association</u>

To make out a prima facie case discrimination based on political association — i.e., pursuant to the First Amendment — a public employee must prove:

> (1) that the employee works for public agency in a position that does not require a political affiliation, (2) that the employee maintained an affiliation with a political party, and (3) that the employee's political affiliation was a substantial or motivating factor in the

adverse employment decision.

Robertson v. Fiore, 62 F.3d 596,599 (3d Cir. 1995) (citing Laskaris v. Thornburgh, 733 F.2d 260, 265 (3d Cir.), cert denied, 469 U.S. 886 (1984); Perez v Cucci, 725 F. Supp. 209, 238-39 (D.N.J. 1989), aff'd, 898 F.2d 139 (3d Cir. 1990)).[10] If the plaintiff-employee is able to show his political association is a substantial or motivating factor in the adverse employment decision, the burden shifts to the employer to show "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." Mt. Healthy City School District Bd. of Education v. Doyle , 429 U.S. 274,287 (1977); Robertson, 62 F.3d at 599 (citations omitted); Raniero v. Antun, 943 F. Supp. 413,423 (D.N.J. 1996).

D'Aurizio's claim that the Board fired him because of his political association is without merit. indeed, as stated above, D'Aurizio's evidence amounts to no more than conclusory allegations that he spoke to two individuals, one of whom is his sister-in-law, who told him the defendants secretly met and conspired to eliminate his custodian position with the Board. However, assuming *arguendo* that D'Aurizio was to make out a prima facie case of discrimination, defendants provide the Court with ample documentary and testimonial evidence demonstrating that the Borough's April 27 Budget Resolution (which eliminated D'Aurizio's job), as well as the Board's prior cuts to the budget, were motivated by nothing more than a legitimately perceived need to reduce the school budget.

Accordingly, D'Aurizio's First Amendment claim, and consequently his section 1983 claim, against the defendants is dismissed. [11]

42 U.S.C. 1985

To establish a claim in violation of the first clause[12] of 42 U.S.C. § 1985(3) ("section 1985(3)"), the plaintiff must allege an prove four elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities wide the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Deblasio v. Zoning Bd. of Adjustment or the Township of West Amwell, 820 F. Supp. 876, 885 (D.N.J. 1993) (quoting Wagner v. Township of Harmar, 651 F. Supp. 1286 (W.D. Pa.), aff'd, 826 F.2d 1058 (3d Cir. 1987)) (citing United Bhd. of Carpenters & Joiners of America, Local 610. AFL-CIO. et al. v. Scott et al., 463 U.S. 825, 828-29 (1983)). Courts have construed the second element to require "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 268-69 (1993) (citing Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)); Pratt v. Thornburgh, 807 F.2d 355, 357 (3d Cir. 1986)). Thus, for example, an allegation by a plaintiff "that he was discriminated against because he was not a political insider . . . fails to allege that he is part of any protected class which would bring him under the protection of § 1985." Deblasio, 820 F. Supp. at 885.

In this case; even if D'Aurizio could prove the conspiracy and injury elements of his section 1985(3) claim against the defendants, he does not allege that the defendants' actions

were motivated by "racial or other class-based invidiously discriminatory animus." Rather, here D'Aurizio is merely claiming that the defendants conspired against him, individually, because of his political association.

Accordingly, D'Aurizio's section 1985(3) claim against the defendants is dismissed.

42 U.S.C. Sec. 1986

42 U.S.C. § 1986 ("section 1986") provides a damages remedy against an individual who fails to prevent a section 1985(3) remedy. Skadegaard v. Farrell, 578 F. Supp. 1209, 1221 n.9 (D.N.J. 1984). Thus, all claims under section 1986 are derivative in nature, requiring a valid underlying section 1985(3) claim. Id. at 1221 (citing Hauptmann v. Wilentz 570 F. Supp. 351, 387 (D.N.J. 1983)); see also Bowman v. Bank of Delaware, 666 F. Supp. 63,64 (D. Del. 1987) ("[i]f the complaint does not state a § 1985(3) cause of action, then any § 1986 claim must fail as well.") In addition, there is a one year statute of limitations for section 1986 claims. Marino v. Bowers, 483 F. Supp. 765, 769 (E.D. Pa. 1980), aff'd, 657 F.2d 1363 (3d Cir. 1981).

Accordingly, D'Aurizio's section 1986 claim in this case fails both because (1) he does not state a valid section 1985(3) claim against the defendants and (2) he waited for more than one year to file his claim.[13]

Pendent Jurisdiction

This Court cannot exercise pendent jurisdiction over state law claims unless, at a minimum, there is:

> a federal claim of sufficient substance to confer

> subject matter jurisdiction on the court. The substantiality of the federal claim is ordinarily determined on the basis of the pleadings. If it appears that the federal claim is subject to dismissal under F. R. Civ. P. 12(b)(6) or could be disposed of on a motion for summary judgment under F. R. Civ. P. 56, then the court should ordinarily refrain from exercising jurisdiction in the absence of extraordinary circumstances.

Tully v. Mott Supermarkets. Inc., 540 F.2d 187 , 195-96 (3d Cir. 1976) (citations omitted); see also University of Maryland at Baltimore v. Peat, Marwick, Main & Company, 1996 F2d 1534, 1540 (3d Cir. 1993).

D'Aurizio alleges state law claims — tortious interference and LAD violations — against the moving defendants. However, D'Aurizio's federal civil rights claims are subject to dismissal by this Court and there are no "extraordinary circumstances" justifying retention of pendent jurisdiction over the state law claims in this case.

Accordingly, defendants' summary judgment motion for an Order of dismissal of plaintiff D'Aurizio's Amended Complaint as to defendants Borough of Palisades Park, Paul Albanese and William Maresca is hereby granted.

s/Joseph A. Greenaway, Jr., U.S.D.J.
Dated: April 28, 1997

Footnotes

[1]D'Aurizio does not provide the exact date when Albanese finished his term on the Borough Council but states in his

Declaration In Opposition to Defendants' Motions for Summary Judgment, dated July 30, 1996, that Albanese "recently lost a mayoral primary challenge against Susan Spohn, who succeeded Maresca." Albanese Dec. ¶ 8. From this statement, the Court can surmise that Albanese's Council term was up some time prior to November 1995, when Maresca resigned.

[2]The Board is not a moving party in this motion.

[3] References in the form "Colabella Certif., Ex. _" are to the Certification of Counsel, by Patricia Colabella, Esq., dated June 17, 1996, submitted in support of this motion.

[4]Pursuant to New Jersey State satutory law, school budgets in New Jersey are created in the following way: (1) the school Board develops a budget, N.J.S.A. 18A:22-32; (2) the dollar amount needed to support the budget is then presented to the voters, N.J.S.A. 18A:22-33; and (3) if the budget passes, the process ends but if it is defeated the Mayor and the Council are mandated to examine the budget and to determine if there are areas where cuts can be made. N.J.S.A. 1 8A:22-37.

[5]D'Aurizio does not provide the exact date of the alleged secret meeting in April.

[6]D'Aurizio alleges that Maresca, Republican Board members — Michael DeBartolo, Mathew Nichols, Robert Carney, Ms. Killion, and Mary Beth Cottrell, and Democrats - Fred Knopp, John Madisench and Chris Brown, ended the secret meeting in April. D'Aurizio further alleges that the same people attend the secret meeting in June, along with Albanese, Thomas Tuscano (Republican Municipal

Chairman) and Republicans, Virginia DeBartolo (Borough official) and Susan Giacobone (executive member of Palisades Park Republican Party). D'Aurizio also claims that the secret meeting in June was held in the conference room of a local law firm, Rotolo & Rotolo.

[7]Mr. DeBartolo is also a defendant in this case.

[8]Specifically, 42 U.S.C. § 1983 provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

[9]The Supreme Court has also held that a municipality is liable under section 1983 "where the decision maker possesses final authority to establish municipal policy with respect to the action ordered. "Pembaur v. City of Cincinnati, 475 U.S. 469,481(1986).

[10]"[A]n employee can show a protected political affiliation even if he or she is a member of the same political party as his or her employer so long as the employer and employee are members of competing identifiable factions within that same party." Christy v. Pennsylvania Turnpike Commission, 904 F. Supp. 427,430 n.3 (E.D. Pa. 1995).

[11]D'Aurizio's has also failed to present sufficient evidence to substantiate his Fourteenth and Fifteenth Amendment claims against the defendants. D'Aurizio's section 1983 claim, premised on his Fourteenth and Fifteenth Amendment claims, is therefore also dismissed.

[12]The first clause of section 1985(3) states, in pertinent part:

"If two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws[.]"

[13]D'Aurizio's section 1986 claim accrued no later than June 9, 1992, when he lost his custodian position with the Board. D'Aurizio filed his initial Complaint on October 4, 1993, more than one year later.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Albert D'Aurizio,
Plaintiff,
v.
Palisades Park, et al.,
Defendants.
Civ. No. 934417 (JAG).

JOSEPH A. GREENAWAY, JR., District Judge,

This matter having been opened to the Court by Gebhardt and Kiefer, P.C., attorneys for defendant Borough of Palisades Park, and Joseph J. Rotolo, Esq., attorney for defendants Paul Albanese and William Maresca. and the Court having considered the submissions of the parties, and good cause appearing,

IT IS on this 28th day of April, 1997

ORDERED that defendants' motion for summary judgment, pursuant to Fed. R. Civ. P. 56(c), for an Order of dismissal of plaintiff's Amended Complaint with respect to defendants — Borough of Palisades Park, Paul Albanese and William Maresca — be and hereby is granted; and

IT IS FURTHER ORDERED that a copy of this Order be served on all parties within seven (7) days of the date of this Order.

(Footnotes Trail Opinion)
Not For Publication

Albert D'AURIZIO, Plaintiff,
v.
PALISADES PARK, et al., Defendants.

Civil No. 93-4417(JAG).

United States District Court,
D. New Jersey.

April 29, 1997.

OPINION

JOSEPH A. GREENAWAY, JR., District Judge,

This matter comes before the Court on the summary judgment motion of Melli & Wright, P.C., attorneys for defendant Smith, Don, Alampi & D'Argenio (hereinafter "Smith, Don").

PRELIMINARY STATEMENT

Plaintiff Albert D'Aurizio ("D'Aurizio"), and his wife Debbie, are members of a large and politically active family in the Borough of Palisades Park (the "Borough"). For years, the D'Aurizio's participated in local Republican and school board politics. D'Aurizio's sister-in-law, defendant Killion, was president of the Board. All of the defendants in this case are individuals D'Aurizio knows through his involvement in local politics; they include William Maresca, the Republican

Mayor of the Borough between 1991 and November 1995, and various members of the Board and the Borough Council. in short, D'Aurizio's claims against the defendants stem from his belief that because he ran for a seat on the Council in 1991 as an independent, as opposed to a Republican candidate, the defendants--all, except for one, who are affiliated with the Republican party - participated in a conspiracy to fire him from his Board-appointed position as a school custodian. In addition, D' Aurizio claims that subsequent to his losing his custodial position in June 1992, defendants continued their conspiracy against him by ensuring that the Board did not place his name on the part-time custodial roster in December 1992, thereby precluding him from exercising his right of first refusal.[1]

FACTS

D'Aurizio's Candidacy.

In April 1991, D'Aurizio, a former Republican, announced his candidacy as an independent candidate for a seat on the Council. In late May or early June 1991, the Board hired D'Aurizio as a part-time custodian. In August 1991, the Board decided, by vote, to make D'Aurizio a full-time custodian. In November 1991, D'Aurizio ran for Council against the Republican ticket and lost. D'Aurizio alleges that his campaign caused a division among the local Republicans. Amended Compliant ¶ 27.

1992-1993 School Budget

In approximately December 1991. the budget process for the Borough's 1992-1993 school year began. On February 4, 1992 ,the Board met to discuss preliminary cuts to the

budget; these cuts included the elimination of one custodial position (a $30,000 cut) and two maintenance positions (a $60,000 cut). See Sherwood Dep., at 174-75.[2] On March 17, 1992, the Board presented its 1992-1993 school budget-- with the proposed cuts -- at a public hearing. Eichenholtz Dep., at 247.[3] On or about April 7, 1992, the Borough voters decided the budget was still too high and voted to defeat it. Killion Dep., at 586-87.[4] As a result, on April 22 and April 26, 1992, the Board, the Mayor (Maresca) and the Council met to review the budget and to determine if they could make any other cuts.[5] These were open meetings mandated by New Jersey State statute and recited in the Council's School Board Budget Resolution, passed on April 27, 1992 ("hereinafter, the "Resolution").

Conspiracy Meetings

D'Aurizio alleges that in addition to the two mandated meetings, the Mayor (Maresca) and members of the "Republican majority" from the Borough secretly met in April[6], and again on June 9, 1992, to conspire to eliminate D'Aurizio's position as a school custodian, i.e., in retaliation for his 1991 independent candidacy for Council.[7] Amended Complaint ¶ 32. Specifically, D'Aurizio claims that defendant DeBartolo, the campaign manager for D'Aurizio's Republican opponent in the November 1991 election, stated at the secret meeting in April:

> "We're getting rid of Al [D'Aurizio] because he ran against us." Id. D'Aurizio adds that all the other Republican members of the Board tacitly agreed with DeBartolo's suggestion "by nodding, or other acts showing ratification of the conspiracy proposal." Id.

However, D'Aurizio testified at his deposition that his

basis for believing that the defendants secretly met, both in April and in June, came only from alleged conversations he had with defendant Killion (his sister-in-law), see D'Aurizio Dep., at 127-28, and defendant Marose, a Democratic member of the Board. Id. at 135-36. Indeed, D'Aurizio admitted at his deposition that other than what he could "surmise" from these two conversations, he had no other knowledge of the alleged secret meeting, which he believes occurred some time in April. Id. at 136 & 139-40. In addition, Ms. Killion stated at her deposition that the April meeting was "an open meeting and anyone could have come." Killion Dep., at 105-06. Moreover, when questioned about his conversation with Ms. Killion regarding the alleged secret meeting in April, D'Aurizio responded: "I do not recall exactly how we found out from her [Ms. Killion]." D'Aurizio Dep., at 127-28.

Ms. Killion also admitted at her deposition that the June meeting was an open Republican meeting, held at the law offices of Rotolo & Rotolo, to discuss the vacant seat on the Board. Killion Dep., at 178-86. In addition, Ms. Killion testified that D'Aurizio's name was not even mentioned during this June meeting other than in a private, side conversation she (Ms. Killion) had with Mr. Albanese, the content of which was: "Paul, Paul [Albanese], come on, this is my brother-in-law", to which Mr. Albanese allegedly responded "well, fire them all." Id., at 101.

D'Aurizio's Termination

On June 2, 1992, the Board informed D'Aurizio by letter that his job would be discussed at the June 9 meeting. D'Aurizio Dec. ¶ 21. On June 9, 1992, the Board voted to eliminate one custodian and two maintenance positions. Id. State statute mandates that the Board had to eliminate the

custodian with the least seniority. NJ.S.A. 1 8A: 17-4. D'Aurizio had been the most recent hire; therefore, the Board terminated his position.

Defendant Smith, Don

Defendant Smith, Don served as counsel to the Board during the relevant time period. D'Aurizio alleges that Berek Don-- the attorney at Smith, Don with whom the Board regularly conferred-- knew of the alleged conspiracy against him because (1) he gave Carol Killion, D'Aurizio's sister-in-law, a job application for Bergen Pines County Hospital which she allegedly was supposed to forward to D'Aurizio[8] and (2) he failed to come forward and give advice to the Board to put D'Aurizio on the part-time custodial list.

Part-Time List

In December 1992, the Board decided to implement a part-time custodial list whereby individuals were called to work on an as-needed basis. NJ.S.A. 18A:17-4, entitled "Reduction in number of janitorial employees", states, in pertinent part, that when the Board is required to reduce its janitorial staff, because of bugetary constraints or the like, "the one having the least number of years to his credit shall be dismissed in preference to any other having a longer term of service and the person so dismissed shall remain upon a preferred eligibility list, in the order of years and service, for reemployment whenever vacancies occur.. ." D'Aurizio's name was not put on the part-time list. However, D'Aurizio's allegation that Smith, Don failed to advise the Board regarding whether or not he should be placed on the part-time hiring list is explicitly refuted by a memorandum written by Berek Don, entitled "Reemployment Rights of

Laid Off Custodians." Ex. B[9]. In this memorandum, Mr. Don advised the Board that part-time contract employment was not a "vacancy" contemplated by the statute. Id. Moreover, the decision to put D'Aurizio on the part-time custodial list was never the responsibility of, or within the power of, either Smith, Don or Berek Don.

DISCUSSION

Fed. R. Civ. P. 56(c) provides for summnary judgment when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Orson. Inc. v. Miramax Fi1m Corp. 79 F.3d 1358, 1366 (3d Cir. 1996). Once the moving party has satisfied its initial burden, the party opposing the motion must establish that a genuine issue as to a material fact exists. Jersey Cent. Power & Light Co. v. Lacey Township, 772 F.2d 1103, 1109 (3d Cir. 1985), cert. denied, 475 U.S. 1013 (1986). The party opposing the motion for summary judgment cannot rest on mere allegations and must instead present actual evidence that creates a genuine issue as to a material fact for trial. Anderson v. Liberty Lobby Inc, 477 U.S. 242, 243 (1986); Siegel Transfer, Inc. v. Carrier Express Inc., 54 F.3d 1125, 1130-31(3d Cir. 1995); Sound Ship Bldg. Corp v. Bethlehem Steel Co., 533 F.2d 96, 99 (3d Cir.), cert. denied, 429 U.S. 860 (1976).

42 U.S.C. Sec. 1983

To state a claim under 42 U.S.C. Sec. 1983 ("section 1983"), a plaintiff must allege two elements: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that this conduct deprived

plaintiff of rights, privileges or immunities secured by the U.S. Constitution or laws of the United States[10]. See West v. Atkins, 487 U.S. 42, 48-49 (1988); Shaw by Strain v. Strackhouse, 920 F.2d 1135, 1142 (3d Cir. 1990); Mcardle v. Tronetti, 769 F. Supp. 188, 190 (W.D. Pa 1991),aff'd, 961 F.2d 1083 (3d Cir. 1992).

Discrimination based on Political Association

To make out a prima facie case of discrimination based on political association -- i.e., pursuant to the First Amendment — a public employee must prove:

> (1) that the employee works for a public agency in a position that does not require a political affiliation, (2) that the employee maintained an affiliation with a political party, and (3) that the employee's political affiliation was a substantial or motivating factor in the adverse employment decision.

Robertson v. Fiore, 62 F.3d 596,599 (3d Cir. 1995) (citing Laskaris v. Thornburgh, 733 F.2d 260,265 (3d Cir.), cert denied, 469 U.S. 886 (1984); Perez v. Cucci, 725 F. supp. 209,238-39 (D.N.J. 1989), aff'd, 898 F.2d 139 (3d Cir. 1990))." If the plaintiff-employee is able to show his political association is a substantial or motivating factor in the adverse employment decision, the burden shifts to the employer to show "by a preponderance of the evidence that it would have reached the same decision ... even in the absence of the protected conduct." Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274,287 (1977); Robertson, 62 F.3d at 599 (citations omitted); Raniero v. Antun, 943 F. Supp. 413,423 (D.N.J. 1996).

i. D'Aurizio's Termination

In this case, D'Aurizio alleges that he was fired from his custodian position because of his political association. However, D'Aurizio's evidence amounts to no more than conclusory allegations that he spoke to two individuals, one of whom is his sister-in-law, who told him the defendants secretly met and conspired to eliminate his custodian position with the Board. By contrast, the defendants provide the Court with ample documentary and testimonial evidence demonstrating that the Board's implementation of the Borough's April 27 Resolution (which eliminated D'Aurizio's job), as well as the Board's prior cuts to the budget, were motivated by nothing more than a legitimately perceived need to reduce the school budget.

Moreover, D'Aurizio does not even contend that defendant Smith, Don, or any representative therefrom, attended either of the secret meetings that allegedly occurred in April and June. Additionally, the fact that Berek Don gave Carol Killion a job application for Bergen Pines County Hospital which she allegedly was supposed to give to D'Aurizio-- fails to show that Smith, Don knew about the Board's decision to eliminate D'Aurizio's custodial position; clearly, such a gesture also does not demonstrate that Smith, Don was involved in any sort of conspiracy against D'Aurizio, because of his political association.

ii. The Part-Time List

D'Aurizio also alleges that because his name was not put on the part-time custodial list-- implemented after his full-time position was terminated — the Board was continuing its conspiracy against him and that somehow

defendant Smith, Don was part of this alleged scheme. However, D'Aurizio's allegation that Smith, Don failed to advise the Board regarding whether or not he should be placed on the part-time hiring list, is explicitly refuted by a memorandum written by Berek Don, entitled "Reemployment Rights of Laid Off Custodians." Ex. B. In this memorandum, Mr. Don advised the Board that part-time contract employment was not a "vacancy" contemplated by the statute. Id. Moreover, the decision to put D'Aurizio on the part-time custodial list was never the responsibility of, or within the power of, either Smith, Don or Berek Don. Finally, in reviewing NJ.S.A. 18A: 17-4, it is clear that the Board complied with all of its requirements. First, D'Aurizio's position was eliminated because of a reduction in the number of janitors. Second, D'Aurizio, as opposed to some other janitor, was dismissed because he had the least seniority with the Board. 'Third, although the statute requires dismissed janitors to be placed on a "preferred eligibility list", a plain reading of the statute does not suggest that the Board is required to place a dismissed janitor on a part-time custodial list.

Moreover, D'Aurizio has failed to provide the Court with evidence demonstrating that his political association was a substantial or motivating factor in the Board's decision to terminate him; thus, the Court certainly cannot find that defendant Smith,Don advised the Board to terminate him because of his political association.

Accordingly, D'Aurizio's First Amendment claims, and consequently his section 1983 claims, against defendant Smith, Don is dismissed.[12]

42 U.S.C. 1985

To establish a claim in violation of the first clause[13] of 42 U.S.C. § 1985(3) ("section 1985(3)"), the plaintiff must allege and prove four elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Deblasio v. Zoning Bd. of Adiustment for the Township of West Amwell, 820 F. Supp. 876.885 (D.N.J. 1993) (quoting Wagner v. Township of Harmar, 651 F. Supp. 1286 (W.D. Pa.), aff'd 826 F.2d 1058 (3d Cir. 1987)) (citing United Bhd. of Carpenters & Joiners of America.Local 610. AFL-CIO. et al. v. Scott et al.. 463 U.S. 825,828-29(1983)). Courts have construed the second element to require "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Bray v. Alexandria Women's Health Clinic, 506 U.S. 263,268-69(1993) (citing Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)); Pratt v. Thornburgh 807 F.2d 355, 357 (3d Cir. 1986)). Thus, for example, an allegation by a plaintiff "that he was discriminated against because he was not a political insider... fails to allege that he is part of any protected class which would bring him under the protection of § 1985." Deblasio, 820 F. Supp. at 885.

In this case, even if D'Aurizio could prove the conspiracy and injury elements of his section 1985(3) claim against the defendant, he does not allege that the defendant's actions were motivated by "racial or other class-based

invidiously discriminatory animus." Rather, here D'Aurizio is merely claiming that the defendant conspired against him, individually, because of his political association.

Accordingly, D'Aurizio's section 1985(3) claim against defendant Smith, Don is dismissed.

42 U.S.C. § 1986 ("section 1986") provides a damages remedy against an individual who fails to prevent a section 1985(3) remedy. Skadegaard v. Farrell, 578 F. Supp. 1209, 1221 n.9 (D.N.J. 1984). Thus, all claims under section 1986 are derivative in nature, requiring a valid underlying section 1985(3) claim. Id. at 1221 (citing Hauptmann v. Wilentz, 570 F. Supp. 351, 387 (D.N.J. 1983)); see also Bowman v. Bank of Delaware, 666 F. Supp. 63,64 (D. Del. 1987) ("If the complaint does not state a § 1985(3) cause of action, then any § 1986 claim must fail as well.") In addition, there is a one year statute of limitations for section 1986 claims. Marino v. Bowers, 483 F. Supp. 765, 769 (E.D. Pa. 1980), aff'd, 657 F.2d 1363 (3d Cir. 1981).

Accordingly, D'Aurizio's section 1986 claim in this case fails both because he does not state a valid section 1985(3) claim against defendant Smith, Don and because he waited for more than one year to file his claim.[14]

Pendent Jurisdiction

This Court cannot exercise pendent jurisdiction over state law claims unless, at a minimum, there is:

> a federal claim of sufficient substance to confer subject matter jurisdiction on the court. The substantiality of the federal claim is ordinarily

> determined on the basis of the pleadings. If it appears that the federal claim is subject to dismissal under F. R. Civ. P.-12(b)(6) or could be disposed of on a motion for summary judgment under F. R. Civ. P. 56, then the court should ordinarily refrain from exercising jurisdiction in the absence of extraordinary circumstances.

Tully v. Mott Supermarkets. Inc., 540 F.2d 187, 195..96 (3d Cir. 1976) (citations omitted); see also University of Maryland at Baltimore v. Peat, Marwick. Main & Company, 996 F.2d 1534, 1540 (3d Cir. 1993).

D'Aurizio alleges state law claims.... tortious interference and LAD violations.... against the moving defendant. However, D'Aurizio's federal civil rights claims are subject to dismissal by this Court and there are no "extraordinary circumstances" justifying retention of pendent jurisdiction over the state law claims in this case.

Accordingly, defendant Smith, Don's summary judgment motion is hereby granted.

JOSEPH A. GREENAWAY, JR U.S.D.J.
Dated: April 28th 1997

[1]On October 4, 1993, D'Aurizio filed his initial Complaint in this case. On February 14, 1994, D'Aurizio filed an Amended Complaint (hereinafter, the "Amended Complaint"), seeking relief against the defendants for: (1) conspiring to violate his First Amendment rights of freedom of association, freedom of speech, freedom to vote and his Fourteenth Amendment rights to equal protection and procedural and substantive due process; (2) violating his First Amendment rights of freedom of association, freedom of speech, freedom to vote and his

Fourteenth Amendment rights to equal protection and procedural and substantive due process; (3) conspiring to violate 42 U.S.C. §§ 1983 and 1985; 4) violating 42 U.S.C. §§ 1983, 1985 and 1986; (5) violating New Jersey's Law Against Discrimination ("LAD"), N.J.S.A. 1O:5-1 to :5-42; and (6) tortious interference.

[2]Deposition of Linda A. Sherwood, sworn to on June 13, 1995.

[3]Deposition of David Eichenholtz, sworn to on January 4, 1996.

[4]Deposition of Carol Killion, sworn to on May 23, 1995.

[5]Pursuant to New Jersey State statutory law, school budgets in New Jersey are created in the following way: (1) the school Board develops a budget, NJ.S.A. ISA:22-32; (2) the dollar amount needed to support the budget is then presented to the voters, NJ.S.A. I 8A:22-33; and (3) if the budget passes, the process ends but if it is defeated the Mayor and the Council are mandated to examine the budget and to determine if there are areas where cuts can be made.

NJ.S.A. 18A:22-37.

[6]D'Aurizio does not provide the exact date of the alleged secret meeting in April.

[7]D'Aurizio does not allege that anyone from Smith, Don attended either of these alleged secret meetings.

[8]D'Aurizio seems to want the Court to infer from this job application that Berek Don knew that D'Aurizio's position was to be eliminated; however, without more, the Court

declines to draw such an inference.

[9]References in the form "Ex. _"are to the exhibits attached to the herein motion for summary judgment.

[10]Specifically, 42 U.S.C. § 1983 provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

[11]"[A]n employee can show a protected political affiliation even if he or she is a member of the same political party as his or her employer so long as the employer and employee are members of competing identifiable factions within that same party." Christy v. Pennsylvania Turnpike Commission, 904 F. supp. 427,430 n.3 (E.D. Pa. 1995).

[12]D'Aurizio has also failed to present sufficient evidence to substantiate his Fourteenth and Fifteenth Amendment claims against the defendants. D'Aurizio's section 1983 claim, premised on his Fourteenth and Fifteenth Amendment claims, is therefore also dismissed..

[13]The first clause of section 1985(3) states, in pertinent part: "If two or more persons... conspire... for the purpose of

depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws[.]"

[14]D'Aurizio's section 1986 claim accrued no later than June 9, 1992. when he lost his custodian position with the Board. D'Aurizio filed his initial Complaint on October 4, 1993, more than one year later.

(Footnotes Trail Opinion)

963 F.Supp. 387
118 Ed. Law Rep. 930
(Cite as: 963 F.Supp. 387)

Albert D'AURIZIO, Plaintiff,
v.
PALISADES PARK, et al., Defendants.

Civil No. 93-4417(JAG).

United States District Court,
D. New Jersey.

April 29, 1997.

ORDER

JOSEPH A. GREENAWAY, JR., District Judge,

This matter having been opened to the Court by Melli & Wright, P.C., attorneys for defendant Smith, Don, Alampi & D'Argenio (hereinafter "Smith, Don")., and the Court having considered the submissions of the parties, and good cause appearing,

IT IS on this 29th day of Apri1, 1997
ORDERED that defendant's motion for sumnmary judgment, pursuant to Fed. R. Civ. P. 56(c), for an Order of dismissal of plaintiff's Amended Complaint with respect to defendant Smith, Don be and hereby is granted; and

IT IS FURTHER ORDERED that a copy of this Order be served on all parties within seven (7) days of the date of this Order.

s/JOSEPH A. GREENAWAY, JR.,U.S.D.J.

(Footnotes Trail Opinion)

963 F.Supp. 387
118 Ed. Law Rep. 930
(Cite as: 963 F.Supp. 387)

Albert D'AURIZIO, Plaintiff,
v.
PALISADES PARK, et al., Defendants.

Civil No. 93-4417(JAG).

United States District Court,
D. New Jersey.

April 29, 1997.

OPINION

GREENAWAY, District Judge.

This matter comes before the Court on the motion to dismiss, or alternatively for summary judgment, of Sinisi, Van Dam, Sproviero & Sokolich, attorneys for defendants James Nichols and Carmine Verdicchio. Because both parties present extrinsic material, the Court will treat this motion as one for summary judgment, pursuant to Fed.R.Civ.P. 56.

PRELIMINARY STATEMENT

Plaintiff Albert D'Aurizio ("D'Aurizio"), and his wife Debbie, are members of a large and politically active family in the Borough of Palisades Park (the "Borough"). For years, the D'Aurizios participated in local Republican and school board politics. D'Aurizio's sister-in-law, Carol Killion (one of the defendants in this case), was president of the Palisades Park Board of Education (hereinafter, the "Board"). All of the defendants in this case are individuals D'Aurizio knows through his involvement in local politics; they include William Maresca, the Republican Mayor of the Borough between 1991 and November 1995, and various members of the Board and the Borough Council. In short, D'Aurizio's claims against the defendants stem from his belief that because he ran for a seat on the Council in 1991 as an independent, as opposed to a Republican candidate, the defendants--all, except for one, who are affiliated with the Republican party--participated in a conspiracy to fire him from his Board-appointed position as a school custodian. In addition, D'Aurizio claims that subsequent to the elimination of his custodial position in June 1992, defendants continued their conspiracy against him by ensuring that the Board did not place his name on the part-time custodial roster in December 1992, thereby precluding him from exercising his alleged right of first refusal. [FN1]

*389 FACTS

D'Aurizio's Candidacy

In April 1991, D'Aurizio, a former Republican, announced his candidacy as an independent candidate for a seat on the Council. In late May or early June 1991, the Board hired D'Aurizio as a part-time custodian. In August 1991, the Board decided, by vote, to make D'Aurizio a fill-time

custodian. In November 1991, D'Aurizio ran for Council against the Republican ticket and lost. D'Aurizio's alleges that his campaign caused a division among the local Republicans. Amended Complaint ¶ 27.

1992-1993 School Budget

In approximately December 1991, the budget process for the Borough's 1992-1993 school year began. On February 4, 1992, the Board met to discuss preliminary cuts to the budget; these cuts included the elimination of one custodial position (a $30,000 cut) and two maintenance positions (a $60,000 cut). Sherwood Dep., at 174-75. [FN2] On March 17, 1992, the Board presented its 1992-1993 school budget--with the proposed cuts--at a public hearing. Eichenholtz Dep., at 247. [FN3] On or about April 7, 1992, the Borough voters defeated the school budget. Killion Dep., at 586-87. [FN4] As a result, on April 22 and April 26, 1992, the Board, the Mayor (Maresca) and the Council met to review the budget and to determine if they could make any other cuts. [FN5] These were open meetings mandated by New Jersey State statute and recited in the Council's School Board Budget Resolution, passed on April 27, 1992 (hereinafter, the "April 27 Budget Resolution").

Conspiracy Meetings

D'Aurizio alleges that in addition to the two mandated meetings, members of the "Republican majority" from the Borough secretly met in April [FN6], and again on June 9, 1992, to conspire to eliminate D'Aurizio's position as a school custodian, i.e., in retaliation for his 1991 independent candidacy for Council. [FN7] Amended Complaint ¶ 32. Specifically, D'Aurizio claims that Michael DeBartolo [FN8],

the campaign manager for D'Aurizio's Republican opponent in the November 1991 election, stated at the secret meeting in April: "We're getting rid of Al [D'Aurizio] because he ran against us." Id. D'Aurizio adds that all the other Republican members of the Board tacitly agreed with DeBartolo's suggestion "by nodding, or other acts showing ratification of the conspiracy proposal." Id.

*390 However, D'Aurizio testified at his deposition that his basis for believing that the defendants secretly met, both in April and in June, came only from alleged conversations he had with Carol Killion (his sister-in-law), see D'Aurizio Dep., at 127-28, and defendant Peter Marose, a Democratic member of the Board. Id. at 135-36. Indeed, D'Aurizio admitted at his deposition that other than what he could "surmise" from these two conversations, he had no other knowledge of the alleged secret meeting, which he believes occurred some time in April. Id. at 136 & 139-40. In addition, Ms. Killion stated at her deposition that the April meeting was "an open meeting and anyone could have come." Killion Dep., at 105-06. Moreover, when D'Aurizio was specifically questioned about his conversation with Ms. Killion regarding the alleged secret meeting in April, D'Aurizio responded: "I do not recall exactly how we found out from her [Ms. Killion]." D'Aurizio Dep., at 127-28.

Ms. Killion also admitted at her deposition that the June meeting was an open Republican meeting, held at the law offices of Rotolo & Rotolo, to discuss the vacant seat on the Board. Killion Dep., at 178-86. In addition, Ms. Killion testified that D'Aurizio's name was not even mentioned during this June meeting other than in a private, side conversation she (Ms. Killion) had with Mr. Albanese, the content of which was: "Paul, Paul [Albanese], come on, this

is my brother-in-law", to which Mr. Albanese allegedly responded "well, fire them all." Id. at 101.

D'Aurizio's Termination

On June 2, 1992, the Board informed D'Aurizio by letter that his job would be discussed at the June 9 meeting. D'Aurizio Dec. ¶ 21. On June 9, 1992, the Board voted to eliminate one custodian and two maintenance positions. In short, the Board officially terminated D'Aurizio's custodian job. Id.

Nichols and Verdicchio

In November 1992--i.e., after D'Aurizio's termination in June 1992--the Board appointed defendant James Nichols ("Nichols") to replace George Fasciano [FN9] as the Palisades Park Superintendent of Schools (the "Superintendent"). Nichols Aff. ¶ 2. [FN10] As Superintendent, Nichols' primary area of focus was the educational curriculum; he generally left responsibility for non- educational matters to the Business Administrator/Board Secretary. [FN11] Id. at ¶ 4. At no time did Nichols have either the power or the authority to place D'Aurizio's name on--or to keep him off--the Board's list of part-time custodial/maintenance employees. Id. at ¶ 6. D'Aurizio specifically refers to Nichols in only 2 of the total 108 paragraphs of his Amended Complaint. First, in paragraph 17, D'Aurizio provides Nichols' address and position as Superintendent and alleges that "Nichols ... conspired and acted in his official and individual capacities in violation of D'Aurizio's rights as more fully stated below." Second, in paragraph 72, D'Aurizio makes a number of other allegations including that:

Defendant James Nichols acted in furtherance of the conspiracy by following the lead of other defendants

notwithstanding his knowledge as to the impropriety of such conduct. In addition, defendant James Nichols actively covered up, and otherwise failed to prevent, the conspiracy and wrongful conduct committed by other defendants, notwithstanding his knowledge of such facts and his opportunity to prevent such conduct. Defendant James Nichols ratified the other defendants' conspiracy and meetings as though to be an actual participant from their inception.

Defendant Carmine Verdicchio ("Verdicchio") was, at all relevant times, employed by the Board as the "lead" custodian for the Palisades Park schools. Verdicchio Aff. ¶ 1. [FN12] *391 As lead custodian, Verdicchio did not have the power or authority to hire or fire employees, including D'Aurizio. Id. at ¶ 3. Verdicchio also had no involvement, either in his capacity as lead custodian or individually, in the Board's (1) decision to eliminate one custodial and two maintenance positions in June 1992 or (2) "adoption of a list of part-time custodial/maintenance employees[.]" Id. at ¶¶ 4-5. D'Aurizio similarly only specifically refers to Verdicchio in 2 paragraphs of his Amended Complaint. First, paragraph 16 provides Verdicchio's address, position as lead custodian and the same conclusory allegation as set forth against Nichols in paragraph 17. Second, paragraph 70, states, in pertinent part, that:

[D]efendant Verdicchio, as Lead Custodian, was empowered and authorized to process job vacancies and offers for the exercise of the right of first refusal. Defendant Verdicchio acted in furtherance of the conspiracy by following the lead of defendant DeBartolo, notwithstanding his knowledge as to the impropriety of such conduct. In addition, defendant Verdicchio actively covered up the conspiracy and wrongful conduct committed by the other defendants. Defendant

Verdicchio ratified the other defendants' conspiracy and meetings as though to be an actual participant from their inception.

However, other than these sweeping allegations, D'Aurizio provides no evidence to bridge the chasm between his broad conclusion that his Constitutional rights were violated and the assertion that either Nichols or Verdicchio are to blame. Accordingly, D'Aurizio's allegations fail to state a claim as a matter of law against either Nichols or Verdicchio. Therefore, the Amended Complaint is dismissed as to defendants Nichols and Verdicchio.

DISCUSSION

Fed.R.Civ.P. 56(c) provides for summary judgment when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) ; Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1366 (3d Cir.1996) . Once the moving party has satisfied its initial burden, the party opposing the motion must establish that a genuine issue as to a material fact exists. Jersey Cent., Power & Light Co. v. Lacey Township, 772 F.2d 1103, 1109 (3d Cir.1985) . The party opposing the motion for summary judgment cannot rest on mere allegations and must instead present actual evidence that creates a genuine issue as to a material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 243, 106 S.Ct. 2505, 2507, 91 L.Ed.2d 202 (1986) ; Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1130-31 (3d Cir.1995) ; Sound Ship Bldg. Corp. v.

Bethlehem Steel Co., 533 F.2d 96, 99 (3d Cir.) , cert. denied, 429 U.S. 860, 97 S.Ct. 161, 50 L.Ed.2d 137 (1976) .

42 U.S.C. § 1983

To state a claim under 42 U.S.C. § 1983 ("section 1983"), a plaintiff must allege two elements: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that this conduct deprived plaintiff of rights, privileges or immunities secured by the U.S. Constitution or laws of the United States [FN13]. See West v. Atkins, 487 U.S. 42, 48-49, 108 S.Ct. 2250, 2254-55, 101 L.Ed.2d 40 (1988) ; Shaw by Strain v. Strackhouse, 920 F.2d 1135, 1142 (3d Cir.1990) ; McArdle v. Tronetti, 769 F.Supp. 188, 190 (W.D.Pa.1991) , aff'd, 961 F.2d 1083 (3d Cir.1992) .

[1] However, "claims for violations of civil rights in this circuit are subject to heightened *392 standards of factual specificity in pleading." Rourke v. United States, 744 F.Supp. 100, 104 (E.D.Pa.1988) , affd, 909 F.2d 1477 (3d Cir.1990) (citing Colburn v. Upper Darby Township, 838 F.2d 663 (3d Cir.1988)); see also Hauptmann v. Wilentz, 570 F.Supp. 351, 374 (D.N.J.1983) ("The Third Circuit requires that a civil rights complaint contain a modicum of specificity, identifying the particular conduct of defendants that is alleged to have harmed the plaintiffs."), aff'd, 770 F.2d 1070 (3d Cir.1985) (citations omitted).

[2][3] Furthermore, in most contexts, the section 1983 "acting under color of state law" inquiry is identical to the "state action" requirement under the Fourteenth Amendment. Groman v. Township of Manalapan, 47 F.3d 628, 638 n. 15 (3d Cir.1995) (citing Robison v. Canterbury Village, Inc., 848 F.2d 424, 427 n. 3 (3d Cir.1988)). Thus, "[w]here the actors are not state or municipal officials, but

are private individuals or associations ... their activity can nevertheless be deemed to be under color of law." Id. at 638. In short, a private party is converted into a state actor where "he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." Lugar v. Edmondson Oil Company, Inc., 457 U.S. 922, 937, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482 (1982) . [FN14]

However, a private action "is not converted into one under color of state law merely by some tenuous connection to the state action. The issue is not whether the state was involved in some way in the relevant events but whether the action taken can be fairly attributed to the state itself." Groman, 47 F.3d at 638-39 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 95 S.Ct. 449, 454, 42 L.Ed.2d 477 (1974)). In addition, "[i]t is not enough ... to show that the private and state actors might have had a common goal unless there is a factually specific allegation that they directed themselves toward an unconstitutional act by virtue of a mutual understanding or agreement." Hauptmann, 570 F.Supp. at 382 (emphasis added) (citations omitted). Moreover, because the "under color of state law" requirement is part of the prima facie case for a section 1983 claim, "the plaintiff bears the burden of proof on that issue." Groman, 47 F.3d at 638 (citing West v. Atkins, 487 U.S. 42, 48, 108 S.Ct. 2250, 2254-55, 101 L.Ed.2d 40 (1988)).

[4] In this case, D'Aurizio's allegations that Nichols and Verdicchio conspired against him are vague and unsubstantiated. In short, D'Aurizio's conclusory contention that Nichols and Verdicchio "conspired and acted in [their] ... official and individual capacities in violation of D'Aurizio's rights" fails to state a claim with the required "modicum of specificity." Amended Complaint ¶¶ 16 -17. D'Aurizio's's

other allegations are also void of any specific factual references: that, for example, Nichols and Verdicchio "actively covered up, ... otherwise failed to prevent ... [and] ratified the other defendants' conspiracy and meetings[.]" Id. at ¶¶ 71-72. Indeed, as Superintendent and lead custodian, respectively, neither Nichols nor Verdicchio had the power to hire or fire D'Aurizio. In short, D'Aurizio has failed to set forth any facts to support his allegations that Nichols and Verdicchio, each in their respective individual capacity, conspired with the other defendants to violate, and actually did violate, D'Aurizio's rights under the Constitution or pursuant to federal law. Accordingly, D'Aurizio's section 1983 claim against Nichols and Verdicchio are dismissed, in the first instance, for lack of specificity.

Discrimination based on Political Association

[5][6] To make out a prima facie case of discrimination based on political association--i.e., pursuant to the First Amendment--a public employee must prove:
(1) that the employee works for a public agency in a position that does not require a *393 political affiliation, (2) that the employee maintained an affiliation with a political party, and (3) that the employee's political affiliation was a substantial or motivating factor in the adverse employment decision. Robertson v. Fiore, 62 F.3d 596, 599 (3d Cir.1995) (citing Laskaris v. Thornburgh, 733 F.2d 260, 265 (3d Cir.) , cert. denied, 469 U.S. 886, 105 S.Ct. 260, 83 L.Ed.2d 196 (1984) ; Perez v. Cucci, 725 F.Supp. 209, 238-39 (D.N.J.1989) , aff'd, 898 F.2d 139 (3d Cir.1990)). [FN15] If the plaintiff-employee is able to show his political association is a substantial or motivating factor in the adverse employment decision, the burden shifts to the employer to show "by a preponderance of the evidence that it would have reached the same decision ... even in the absence of the protected

conduct." Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977) ; Robertson, 62 F.3d at 599 (citations omitted); Raniero v. Antun, 943 F.Supp. 413, 423 (D.N.J.1996) .

[7] In this case, D'Aurizio contends that he was fired from his custodian position because of his political association. However, D'Aurizio's evidence amounts to no more than conclusory allegations that he spoke to two individuals, one of whom is his sister-in-law, who told him the defendants secretly met and conspired to eliminate his custodian position with the Board. By contrast, the defendants provide the Court with ample documentary and testimonial evidence demonstrating that the Borough's April 27 Budget Resolution (which eliminated D'Aurizio's job), as well as the Board's prior cuts to the budget, were motivated by nothing more than a legitimately perceived need to reduce the school budget.

Moreover, D'Aurizio does not even argue that either Nichols or Verdicchio attended the very meetings--in April and June--where the other defendants allegedly conspired against him In addition, as lead custodian, Verdicchio did not have the power or authority to hire or fire employees, including D'Aurizio. Verdicchio Aff. ¶ 3. Verdicchio also had no involvement, either in his capacity as lead custodian or individually, in the Board's (1) decision to eliminate one custodial and two maintenance positions in June 1992, or (2) "adoption of a list of part-time custodial/maintenance employees [.]" Id. at ¶¶ 4-5. As Superintendent, Nichols' primary area of focus was the educational curriculum; he generally left responsibility for non- educational matters to the Business Administrator/Board Secretary. Nichols Aff. ¶ 4. Nichols also did not have either the power or the authority to

place D'Aurizio's name on--or to keep him off--the Board's list of part-time custodial/maintenance employees. Id. at ¶ 6.

Accordingly, D'Aurizio has failed to show that his 1991 independent candidacy for Council--and thus his political association--was a "substantial or motivating factor" in the Board's decision to eliminate his custodian position; moreover, even if he had proven discrimination by the Board, D'Aurizio provides no evidence that the defendants, Nichols or Verdicchio, even participated in the decision to eliminate his job. Therefore, D'Aurizio's First Amendment claims, and consequently his section 1983 claims, against defendants Nichols and Verdicchio are dismissed. [FN16]

42 U.S.C. § 1985

[8] To establish a claim in violation of the first clause [FN17] of 42 U.S.C. § 1985(3) ("section 1985(3)"), the plaintiff must allege and prove four elements:

*394 (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.
Deblasio v. Zoning Bd., of Adjustment for the Township of West Amwell, 820 F.Supp. 876, 885 (D.N.J.1993) (quoting Wagner v. Township of Harmar, 651 F.Supp. 1286 (W.D.Pa.) , aff'd, 826 F.2d 1058 (3d Cir.1987)) (citing United Bhd. of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825, 828-29, 103 S.Ct. 3352, 3355-57, 77 L.Ed.2d 1049 (1983)). Courts have construed the second element to require "some racial, or perhaps

otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 268-69, 113 S.Ct. 753, 759, 122 L.Ed.2d 34(1993) (citing Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971) ; Pratt v. Thornburgh, 807 F.2d 355, 357 (3d Cir.1986)). Thus, for example, an allegation by a plaintiff "that he was discriminated against because he was not a political insider ... fails to allege that he is part of any protected class which would bring him under the protection of § 1985." Deblasio, 820 F.Supp. at 885.

[9] In this case, even if D'Aurizio could prove the conspiracy and injury elements of his section 1985(3) claim against the defendants, he does not allege that the defendants' actions were motivated by "racial or other class-based invidiously discriminatory animus." Rather, here D'Aurizio is merely claiming that the defendants conspired against him, individually, because of his political association.

Accordingly, D'Aurizio's section 1985(3) claim against defendants Nichols and Verdicchio is dismissed.

42 U.S.C. § 1986

[10] 42 U.S.C. § 1986 ("section 1986") provides a damages remedy against an individual who fails to prevent a section 1985(3) conspiracy. Skadegaard v. Farrell, 578 F.Supp. 1209, 1221 n. 9 (D.N.J.1984) . Thus, all claims under section 1986 are derivative in nature, requiring a valid underlying section 1985(3) claim. Id. at 1221 (citing Hauptmann v. Wilentz, 570 F.Supp. 351, 387 (D.N.J.1983)); see also Bowman v. Bank of Delaware, 666 F.Supp. 63, 64 (D.Del.1987) ("If the complaint does not state a § 1985(3) cause of action, then any § 1986 claim must fail as well.") In addition, there is a

one year statute of limitations for section 1986 claims. Marino v. Bowers, 483 F.Supp. 765, 769 (E.D.Pa.1980) , aff'd, 657 F.2d 1363 (3d Cir.1981) .

Accordingly, D'Aurizio's section 1986 claim in this case fails both because he does not state a valid section 1985(3) claim against the defendants and because he waited for more than one year to file his claim. [FN18]

Pendent Jurisdiction

[11] This Court cannot exercise pendent jurisdiction over state law claims unless, at a minimum, there is:
a federal claim of sufficient substance to confer subject matter jurisdiction on the court. The substantiality of the federal claim is ordinarily determined on the basis of the pleadings. If it appears that the federal claim is subject to dismissal under F.R. Civ. P. 12(b)(6) or could be disposed of on a motion for summary judgment under F.R. Civ. P. 56, then the court should ordinarily refrain from exercising jurisdiction in the absence of extraordinary circumstances.
Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 195-96 (3d Cir.1976) (citations omitted); see also University of Maryland at Baltimore v. Peat, Marwick, Main & Company, 996 F.2d 1534, 1540 (3d Cir.1993) .

D'Aurizio alleges state law claims--tortious interference and LAD violations-- against the moving defendants. However, *395 D'Aurizio's federal civil rights claims are subject to dismissal by this Court and there are no "extraordinary circumstances" justifying retention of pendent jurisdiction over the state law claims in this case.

Accordingly, defendants' summary judgment motion for an Order of dismissal of plaintiff D'Aurizio's Amended Complaint as to defendants James Nichols and Carmine Verdicchio is hereby granted.

ORDER

This matter having been opened to the Court by Sinisi, Van Dam, Sproviero & Sokolich, attorneys for defendants James Nichols and Carmine Verdicchio, and the Court having considered the submissions of the parties, and good cause appearing,

IT IS on this 28th day of April, 1997

ORDERED that defendants' motion for summary judgment, pursuant to Fed.R.Civ.P. 56(c), for an Order of dismissal of plaintiff's Amended Complaint with respect to defendants--James Nichols and Carmine Verdicchio--be and hereby is granted; and

IT IS FURTHER ORDERED that a copy of this Order be served on all parties within seven (7) days of the date of this Order.

END OF DOCUMENT

FN1. On October 4, 1993, D'Aurizio filed his initial Complaint in this case. On February 14, 1994, D'Aurizio filed an Amended Complaint (hereinafter, the "Amended Complaint"), seeking relief against the defendants for: (1) conspiring to violate his First Amendment rights of freedom of association, freedom of speech, freedom to vote and his Fourteenth Amendment rights to equal protection and procedural and substantive due process; (2) violating his First Amendment rights of freedom of association, freedom of speech, freedom to vote and his Fourteenth Amendment rights to equal protection and procedural and substantive due process; (3) conspiring to violate 42 U.S.C. § § 1983 and 1985; (4) violating 42 U.S.C. § § 1983, 1985 and 1986; (5) violating New Jersey's Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 to:5-42; and (6) tortious interference.

FN2. Deposition of Linda A. Sherwood, sworn to on June 13, 1995.

FN3. Deposition of David Eichenholtz, sworn to on January 4, 1996.

FN4. Deposition of Carol Killion, sworn to on May 23, 1995.

FN5. Pursuant to New Jersey State statutory law, school budgets in New Jersey are created in the following way: (1) the school Board develops a budget, N.J.S.A. 18A:22-32; (2) the dollar amount needed to support the budget is then presented to the voters, N.J.S.A. 18A:22-33; and (3) if the budget passes, the process ends but if it is defeated the Mayor and the Council are mandated to examine the budget and to determine if there are areas where cuts can be made. N.J.S.A. 18A:22-37.

FN6. D'Aurizio does not provide the exact date of the alleged secret meeting in April.

FN7. D'Aurizio alleges that Maresca, Republican Board members--Michael DeBartolo, Mathew Nichols, Robert Carney, Ms. Killion, and Mary Beth Cottrell, and Democrats--Fred Knopp, John Madisench and Chris Brown, attended the secret meeting in April. D'Aurizio further alleges that the same people attended the secret meeting in June, along with Republicans Thomas Tuscano (Republican Municipal Chairman) Virginia DeBartolo (Borough official), Paul Albanese (Borough Council) and Susan Giacobone (executive member of Palisades Park Republican Party). D'Aurizio also claims that the secret meeting in June was held in the conference room of a local law firm, Rotolo & Rotolo.

FN8. Mr. DeBartolo is also a defendant in this case.

FN9. Mr. Fasciano is also a defendant in this case.

FN10. References in the form "Nichols Aff. ¶ " are to the Affidavit of James Nichols, sworn to on May 28, 1996, and submitted in support of this motion.

FN11. The Business Administrator and Board Secretary are two separate and distinct positions, and, in most school systems, are held by two different individuals. However, in Palisades Park, defendant David Eichenholtz functioned as both Business Administrator and Board Secretary.

FN12. References in the form "Verdicchio Aff. ¶ _" are to the Affidavit of Carmine Verdicchio, sworn to on May 28,1996, and submitted in support of this motion.

FN13. Specifically, 42 U.S.C. § 1983 provides that:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

FN14. See also Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 621-22, 111 S.Ct. 2077, 2083, 114 L.Ed.2d 660 (1991) ("in determining whether a particular course of conduct is governmental in character, it is relevant to examine ... the extent to which the actor relies on governmental assistance and benefits; ... whether the actor is performing a traditional governmental function; ... and whether the inquiry caused is aggravated in a unique way by the incidents of governmental authority.")

FN15. "[A]n employee can show a protected political affiliation even if he or she is a member of the same political party as his or her employer so long as the employer and employee are members of competing identifiable factions within that same party." Christy v. Pennsylvania Turnpike Commission, 904 F.Supp. 427, 430 n. 3 (E.D.Pa.1995) .

FN16. Aurizio has also failed to present sufficient evidence to substantiate his Fourteenth and Fifteenth Amendment claims against the defendants. D'Aurizio's section 1983 claim,

premised on his Fourteenth and Fifteenth Amendment claims, is therefore also dismissed.

FN17. The first clause of section 1985(3) states, in pertinent part: "If two or more persons ... conspire ... for the purpose of depriving. either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws[.]"

FN18. D'Aurizio's section 1986 claim accrued no later than June 9, 1992, when he lost his custodian position with the Board. D'Aurizio filed his initial Complaint on October 4, 1993, more than one year later.

(Footnotes Trail Opinion)

ALBERT D'AURIZIO, Plaintiff,
v.
PALISADES PARK, et al., Defendants.

Civil No. 93-4417(JAG).

United States District Court,
D. New Jersey.

April 29, 1997.

JOSEPH A. GREENAWAY, JR. District Judge,

This matter comes before the Court on the summary judgment motion of Methfessel & Werbel, Esqs., attorneys for defendant Palisades Board of Education (the "Board") and individual defendants Michael DeBartolo, Mary Beth Cotrell, Robert Carney, Carol Killion, Francis Valenzuela, David Eichenholtz, Carmine Verdicchio, James Nichols, Mathew Nichols, George Fasciano and Peter Marose, in their capacities as members and/or officers of the Board, (collectively referred to as the "Board defendants").

PRELIMINARY STATEMENT

Plaintiff Albert D'Aurizio ("D'Aurizio"), and his wife Debbie, are members of a large and politically active family in the Borough of Palisades Park (the "Borough"). For years, the D'Aurizios participated in local Republican and school board politics. D'Aurizio's sister-in-law, defendant Killion, was president of the Board. All of the defendants in this case are individuals D'Aurizio knows through his involvement in local politics; they include William Maresca, the Republican

Mayor of the Borough be en 1991 and November 1995, and various members of the Board and the Borough Council. In short, D'Aurizio's claims against the defendants stem from his belief that because he ran for a seat on the Council in 1991 as an independent, as opposed to a Republican candidate, the Defendants — all, except for one, who are affiliated with the Republican party — participated in a conspiracy to fire him from his Board-appointed position as a school custodian. In addition, D'Aurizio claims that subsequent to the elimination of his custodial position in June 1992, defendants continued their conspiracy against him by ensuring that the Board did not place his name on the part-time custodial roster in December 1992, thereby precluding him from exercising his right of first refusal.[1]

FACTS

D'Aurizio's Candidacy

In April 1991, D'Aurizio, a former Republican, announced his candidacy as an independent candidate for a seat on the Council. In late May or early June 1991, the Board hired D'Aurizio as a part-time custodian. In August 1991, the Board decided, by vote, to make D'Aurizio a full-time custodian. In November 1991, D'Aurizio ran for Council against the Republican ticket and lost. D'Aurizio alleges that his campaign caused a division among the local Republicans. Amended Complaint 27.

1992-1993 School Budget

In approximately December 1991, the budget process for the Borough's 1992-1993 school year began. Ex. B, at 517 & 676.2 February 4, 1992, the Board met to discuss preliminary cuts to the budget; these cuts included the

elimination of one custodial position (a $30,000 cut) and two maintenance position (a $60,000 cut). Sherwood Dep., at 174-75.[3] On March 17, 1992, the Board presented its 1992-1993 school budget — with the proposed cuts — at a public hearing. Eichenholtz Dep., at 24 .[4] On or about April 7, 1992, the Borough voters decided the budget was still too high and therefore voted to defeat it.. Ex. B, at 586-87. As a result, on April 22 and April 26, 1992, the Board the Mayor (Maresca) and the Council met to review the budget and to determine if they could make any other cuts.[5] These were open meetings mandated by New Jersey State statute and recited in the Council's School Board Budget Resolution, passed on April 27, 1992 ("hereinafter, the "Resolution"). Ex. D.

Specifically, the Resolution further reduced the janitorial staff" with the elimination of one custodian who was not returning to work and the Director of Maintenance. Ex. D. In its final form, the Resolution reflected an overall budget reduction of $579,000. Id.

D'Aurizio's Termination

On June 2,1992, the Board informed D'Aurizio by letter that his job would be discussed at the June 9 meeting. D'Aurizio Dec. 21. On June 9, 1992, the Board adopted the Resolution handed down in April by Mayor Mares and the Council; among the items adopted by the Board were the elimination of the Director of Maintenance position, one custodian position and two maintenance positions. Ex. D. State statute mandated that the Board had to eliminate the custodian with the least seniority. Ex. B at 107; N.J.S.A. 18A:17-4. D'Aurizio had been the most recent hire. Therefore, the Board terminated his position.

The Part-Time Custodial List

In December 1992, the Board decided to implement a part-time custodial list whereby individuals were called to work on an as needed basis. The Board did not want full-time employees because of the added-cost; part-time workers received full benefits and could work an unlimited number of overtime hours but part-time workers were limited to 19 and 1/2 work hours. Ex. G, at 182. Before putting the part-tim e list together, the Board consulted their attorneys on who they were required by statute[7], top on this list The Board was informed that, pursuant to State statute, persons dismissed because of seniority were supposed to remain on a "preferred eligibility list for reemployment whenever vacancies occur", see N.J.S.A. 1 8A: 17-4, Ex. H; however, the Board's attorneys told them that "[p]art time contract employment to meet an immediate, temporary need" was not, in their opinion, "a 'position' contemplated by the statute." Ex. H.

The Board never hired any full- time janitors to replace D'Aurizio. In fact. approximately two years after D'Aurizio' termination, all of the custodial positions were eliminated and outside contractors performed all custodial duties. Ex. 0, at 69-70.

Conspiracy Meetings

D'Aurizio alleges that in addition the two mandated meetings, members of the "Republican majority" from the Borough secretly met in April', and again on June 9, 1992, to conspire to eliminate D'Aurizio's position as a school custodian. i.e., in retaliation for his 1991 independent candidacy for Council.[9] Amended Complaint ¶ 32. Specifically, D'Aurizio claims that defendant DeBartolo, the campaign manager for D'Aurizio's Republican opponent in

the November 1991 election, stated at the meeting in April: "We're getting rid of Al [D'Aurizio] because he ran against us." Id. D'Aurizio adds that all the other Republican members of the Board tacitly agreed with DeBartolo's suggestion "by nodding, or other acts showing ratification of the conspiracy proposal." Id.

However, D'Aurizio testified at his deposition that his basis for believing that the defendants secretly met, both in April and in June, came only from alleged conversations he had with defendant Killion (his sister-in-law), see D'Aurizio Dep. at 127-28, and defendant Marose, a Democratic member of the Board. Id. 135-36. Indeed, D'Aurizio admitted at his deposition that other than what he could "surmise" from these two conversations, he had no other knowledge of the alleged secret meeting ,which he believes occurred some time in April. Id. at 136 & 139-40. In addition, Ms. Killion stated at her deposition that the April meeting was "an open meeting and anyone could have come." Killion Dep. at 105-06.[10] Moreover, when questioned about his conversation with Ms. Killion regarding the alleged secret meeting in April, D'Aurizio responded: "I do not recall exactly how we found out from her [Ms. Killion]." D'Aurizio Dep. at 127-28.

Ms. Killion also admitted at her deposition that the June meeting was an open Republican meeting, held at the law offices of Rotolo & Rotolo, to discuss the vacant seat on the Board. Killion Dep. at 178-86. In addition, Ms Killion testified that D'Aurizio's name was not even mentioned during this June meeting other than in a private, side conversation she (Ms. Killion) had with Mr. Albanese, the content of which was: "Paul, Paul [Albanese], come on, this is my brother-in-law", to which Mr. Albanese allegedly responded "well, fire them all." Id. at 101. Fed. R. Civ. P. 56(c) provides for summary judgment when the moving party

demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment a matter of law. Celotex Corp. v. Catrett, 477 U.S.317 (1986); Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1366 (3d Cir. 1996). Once the moving party has satisfied its initial burden, the party opposing the motion must establish that a genuine issue as to a material fact exists. Jersey Cent. Power & Light Co. v. Lacey Township, 772 F.2d 1103, 1109 (3d Cir. 1985), cert denied 475 U.S. 1013 (1986). The party opposing the motion for summary judgment cannot rest on mere allegations and must instead present actual evidence that creates a genuine issue as to a material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 243 (1986); Siegal Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1130-31 (3d Cir. 1995); Sound Ship Bldg. Corp. v. Bethlehem Steel Co., 533 F.2d 96,99 (3d Cir.), cert. denied, 429 U.S. 860 (1976).

42 U.S.C. Sec. 1983

To state a claim under 42 U.S.C. § 1983 ("section 1983"), a plaintiff must allege two elements: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that this conduct deprived plaintiff of rights, privileges or immunities secured by the U.S..... Constitution or laws of the United States". See West v. Atkins, 487 U.S 42,48-49 (1988); Shaw by Strain v. Strackhouse, 920 F.2d 1135, 1142 (3d Cir. 1990); McArdle v. Tronetti, 769 F. Supp. 188, 190(WD. Pa. 1991), aff'd, 961 F.2d 1083 (3d Cir. 1992).

Discrimination based on political Association

To make out a prima facie case of discrimination based on political association — i.e., pursuant to the First Amendment — a public employee must prove:

> (1) that the employee works for public agency in a position that does not require a political affiliation, (2) that the employee maintained an affiliation with a political party, and (3) that the employee's political affiliation was a substantial or motivating factor in the adverse employment decision.

Robertson v. Fiore, 62 F.3d 596,599(3d Cir. 1995) (citing Laskar v. Thornburgh, 733 F.2d 260,265 (3d Cir.), cert denied, 469 U.S. 886 (1984); Perez v. Cucci, 725 F. Supp. 209,238-39 (D.N.J. 1989), aff.d. 898 F.2d 139 (3d Cir. 1990)).[12] If the plaintiff-employee is able to show his political association is a substantial or motivating factor in the adverse employment decision, the burden shifts to the employer to show "by a preponderance of the evidence that it would have reached the same decision... even in absence of the protected conduct."Mt.Healthy City School District Board of Education v. Doyle , 429 U.S. 274,287 (1977); Robertson, 62 F.3d at 599 (citations omitted); Raniero v. Antun 943 F. Supp. 413,423 (D.N.J. 1996).

i. D'Aurizio's Termination

In this case, D'Aurizio contends he was fired from his custodian position because of his political association. However, D'Aurizio's evidence amounts to no more than conclusory allegations that he spoke to two individual , one of whom is his sister-in-law, who told him the defendants secretly met and conspired to eliminate his custodian position with the Board. By contrast, the Board defendants provide

the court with ample documentary and testimonial evidence demonstrating that their implementation of the Borough's April 27 Resolution (which eliminated D'Aurizio's job), as well as the Board's prior cuts to the budget, were motivated by nothing more than a legitimately perceived need to reduce the school budget. Indeed, the Resolution reflected an overall reduction the 1992-1993 school budget of $579,000. Ex. D.

ii. The Part-Time List

D'Aurizio also does not provide sufficient evidence to create a genuine issue as to a material fact that, by not placing him on part-time custodial list, the Board defendants were retaliating or discriminating against him because of his political association. N.J.S.A. 18A:17-4 states:

> No Board of Education shall reduce the number of janitors... by reason of... political affiliation and when any janitor... is dismissed by reason of reduction in the number of such employees the one having the least number of years to his credit shall be dismissed in preference ... and the person so dismissed shall be and remain a part of a preferred eligibility list, in the order of years of service for reemployment whenever vacancies occur. ..

In reviewing the above statute, it is clear the Board defendants complied with all of its requirements. First, D'Aurizio's position was eliminated because of a reduction in the number of janitors. Second, D'Aurizio, as opposed some other janitor, was dismissed because he had the least seniority with the Board. Third, although the statute requires dismissed janitors to be placed on a "preferred eligibility list", a plain reading of the statute does not suggest that the Board is required to place a dismissed janitor on a part-time

custodial list. In addition, the Board consulted their attorneys on the meaning of N.J.S.A. 18A-17:4 and were told that the "preferred eligibility list" concerned the reemployment of a dismissed janitor in the event a vacancy occurs. Here, there was no reemployment because of a vacancy but rather the Board called in individuals because of necessity. Indeed, the Board never hired any full-time janitors to replace D'Aurizio. In fact, two years after D'Aurizio's termination, the Board eliminated all custodial positions and hired outside contractors. Ex. G, at 69-70.

Accordingly, D'Aurizio has failed to show that his 1991 independent candidacy for Counsel — and thus his political association — was a "substantial or motivating factor" in the Board's decision to (1) eliminate his custodian position or (2) not to place him on the part-time custodial list. Therefore, D'Aurizio's First Amendment claims, and consequently his section 1983 claims, against the Board defendants are dismissed.[13]

42 U.S.C. 1985

To establish a claim in violation of the first clause[14] of 42 U.S.C. § 1985(3) ("section 1985(3)"), the plaintiff must allege and prove four elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege a citizen of the United States.

Deblasio v. Zoning Board of Adjustment for the Township of West Amwell, 820 F. Supp. 876, 885 (D.N.J. 1993) (quoting Wagner v. Township of Harmar, 651 F. Supp. 1286 (W.D. Pa.), aff'd, 826 F.2d 1058 (3d Cir. 1987)) (citing United Bhd. of Carpenters & Joiners of America. Local 610. AFL-CIO. et al. v. Scott et al. 63 U.S. 825, 828-29 (1983)). Courts have construed the second element to require "some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Bray v. Alexandria Women's Health Clinic, 506 U.S. 263,268-69 (1993) (citing Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)); Pratt v. Thornburgh, 807 F.2d 355,357(3d Cir. 1986)). Thus, for example, an allegation by a plaintiff "that he was discriminated against because he was not a political insider... fails to allege that he is part of any protected class which would bring him under the protection of § 1985." Deblasio, 820 F. Supp. at 885.

In this case, even if D'Aurizio could prove the conspiracy and injury elements of his section 1985(3) claim against the defendants, he does not allege that the defendants' actions were motivated by "racial or other class-based invidiously discriminatory animus." Rather, here D'Aurizio is merely claiming that the defendants conspired against him, individually, because of his political association.

Accordingly, D'Aurizio's section 1985(3) claim against the Board defendants is dismissed.

42 U.S.C. Sec. 1986

42 U.S.C.. § 1986 ("section 1986") provides a damages remedy against an individual who fails to prevent a section 1985(3) remedy. Skadegaard v. Farrell 578 F. Supp. 1209, 1221 n.9 (D.N.J. 1984). Thus, all claims under section

1986 are derivative in nature, requiring a valid underlying section 1985(3) claim. Id. at 1221 (citing Hauptmann v. Wilentz 570 F. Supp. 351, 387 (D.N.J. 1983)); see also Bowman v. Bank of Delaware, 666 F. Supp. 63,64 (D. Del. 1987)

("If the complaint does not state a § 1985(3) cause of action, then any § 1986 claim must fail as well.") In addition, there is a one year statute of limitations for section 1986 claims. Marino v. Bowers, 483 F. Supp. 765, 769 (E.D. Pa. 1980), aff'd, 657 F.2d 1363 (3d Cir. 1981).

Accordingly, D'Aurizio's section 1986 claim in this case fails both because he does not state a valid section 1985(3) claim against the Board defendants and because he waited for more than one year to file his claim.[15]

Pendent Jurisdiction

This Court cannot exercise pendent jurisdiction over state law claims unless, at a minimum, there is:

> a federal claim of sufficient substance to confer subject matter jurisdiction on the court. The substantiality of the federal claim is ordinarily determined on the basis of the pleadings. If it appears that the federal claim is subject to dismissal under F. R. Civ. P. 12(b)(6) or could be disposed of on a motion for summary judgment under F. R. Civ. P. 56, then the court should ordinarily refrain from exercising jurisdiction in the absence of extraordinary circumstances.

Tully v. Mott Supermarkets Inc, 540 F.2d 187, 195-96 (3d Cir. 1976) (citations omitted); see also University of

Maryland at Baltimore v. Peat, Marwick, Main, & Company, 996 F.2d 1534, 1540 (3d Cir. 1993).

D'Aurizio alleges state law claims -- tortious interference and LAD violations -- against the moving defendants. However, D'Aurizio's federal civil rights claims are subject to dismissal by this Court and there are no extraordinary circumstances" justifying retention of pendent jurisdiction over the state law claims in this case.

Accordingly, the Board defendants' summary judgment motion is hereby granted.

JOSEPH A. GREENAWAY, JR., U.S.D.J.

Dated: April 28th 1997

Footnotes

'On October 4,1993, D'Aurizio filed his initial Complaint in this case. On February 14, 1994, D'Aurizio filed an Amended Complaint (hereinafter, the "Amended Complaint"), seeking relief against the defendants for: (1) conspiring to violate his First Amendment rights of freedom of association, freedom of speech, Freedom to vote and his Fourteenth Amendment rights to equal protection and procedural and substantive due process; (2) violating his First Amendment rights of freedom of association, freedom of speech, freedom to vote and his Fourteenth Amendment rights to equal protection and procedural and substantive due process; (3) conspiring to violate 42 U.S.C. §§ 1983 and 1985; (4) violating 42 U.S.C. §§ 1983, 1985 and 1986; (5) violating New Jersey's Law

Against Discrimination ("LAD"), N.J.S.A. *10:5-1* to *:5-42;* and (6) tortious interference.

[2]References in the form "Ex. "are to the exhibits attached by the Board defendants to the herein motion for summary judgment.

[3]Deposition of Linda A. Sherwood sworn to on June 13,1995.

[4]Deposition of David Eichenholtz sworn to on January 4, 1996.

[5]Pursuant to New Jersey State statutory law, school budgets in New Jersey are created in the following way: (1) the school Board develops a budget, N.J.S.A. 18A:22-32; (2) the dollar amount needed to support the budget is then presented to the voters, N.J.S.A. 1 8A:22-33; and (3) if the budget passes, the process ends but if it is defeated the Mayor and the Council are mandated to examine the budget and to determine if there are areas where cuts can be made. N.J.S.A.I 8A:22-37.

[6]The cuts to the janitorial staff in the Resolution were in addition to the initial elimination of one custodial and two maintenance positions, decided by the Board prior to the budget's defeat in March 1992.

[7]N.J.S.A. 18A:17-4. entitled "Reduction in number of janitorial employees", states, in pertinent part, that when the Board has to reduce its janitorial staff, because of budgetary constraints or the like, "the one having least number of years to his credit shall be dismissed in preference to any other having a longer of service and the person so dismissed shall remain upon a preferred eligibility list, in order of years and service, for reemployment whenever vacancies occur. .."

[8]D'Aurizio does not provide the date of the alleged secret meeting in April.

[9]D'Aurizio alleges that Maresca, Bartolo, Nichols, Carney, Killion and Cottrell, as well as Democratic Board members - F Knopp, John Madisench and Chris Brown, attended the secret meeting in April D'Aurizio further alleges that the same people attended the secret meeting in June, along with Thomas T o (Republican Municipal Chairman) and Virginia DeBartolo (Borough official), Paul Al (Borough Council) and Susan Giacobone (executive member of Palisades Park Republican Party). D'Aurizio also claims that the secret meeting in June was held in the conference room of a local law firm, Rotolo & Rotolo.

[10]Deposition of Carol Killion, sworn to on May 23, 1995.

[11]Specifically, 42 U.S.C. § 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

[12]"[a]n employee can show a protected political affiliation even if he or she is a member of the same political party as his

or her employer so long as the employer and employee are members of competing identifiable factions within that same party." Christy v. Pennsylvania Turnpike Commission, 904 F. Supp. 427 ,430 n.3 (E.D. Pa. 1995).

[13]D'Aurizio has also failed to sent sufficient evidence to substantiate his Fourteenth and Fifteenth Amendment claims the defendants. D'Aurizio's section 1983 claim, premised on his Fourteenth and Fifteen Amendment claims, is therefore also dismissed.

[14]The first clause of section 1985 (3) states, in pertinent part: "If two or more persons . . conspire ... for the purpose of depriving; either directly or indirectly, any person or class of persons of the equal protection of the law, or of equal privileges and immunities under the laws[.]"

[15]D'Aurizio's section 1986 claim accrued no later than June 9, 1992, when he lost his custodian position with the Board. D'Aurizio filed his initial Complaint on October 4,1993, more than one year later.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civ. No. 934417 (JAG)

Albert D'Aurizio,
Plaintiff,

v.

Palisades Park, et al.,

ORDER

Defendants.

JOSEPH A. GREENAWAY, JR., District Judge,

This matter having been opened to the Court by Methfessel & Werbel, Esqs., attorneys for defendants Palisades Board of Education, Michael DeBartolo, Mary Beth Cotrell, Robert Carney, Carol Killion, Francis Valenzuela, David Eichenholtz, Carmine Verdicchio, James Nichols, Mathew Nichols, George Fasciano and Peter Marose, (collectively the "Board defendants"), and the Court having considered the submissions of the parties, and good cause appearing,

IT IS on this 28th day of April, 1997

ORDERED that defendants' motion for summary judgment, pursuant to Fed. R. Civ. P. 56(c), for an Order of dismissal of plaintiff's Amended Complaint with respect to the Board defendants — Palisades Board of Education, Michael DeBartolo, Mary Beth Cotrell, Robert Carney, Carol

Killion, Francis Valenzuela, David Eichenholtz, Carmine Verdicchio, James Nichols, Mathew Nichols, George Fasciano and Peter Marose — be and hereby is granted; and IT IS FURTHER ORDERED a copy of this Order be served on all parties within seven (7) days of the date of this Order.

JOSEPH A. GREENAWAY, JR., U.S.D.J.

Supreme Court, U.S.
FILED
AUG 3 1998
OFFICE OF THE CLERK

No. 98-57

In The

Supreme Court of the United States

October Term, 1997

ALBERT D'AURIZIO,

vs. *Petitioner,*

BOROUGH OF PALISADES PARK, BOARD OF EDUCATION OF PALISADES PARK, WILLIAM MARESCA, individually, and as Mayor of Palisades Park, PAUL ALBANESE, individually and as a member of the Borough Council, MICHAEL DeBARTOLO, individually and as a member of the Board of Education, VIRGINIA DeBARTOLO, individually and as a Borough official, MARY BETH COTTRELL, individually and as a member of the Board of Education, ROBERT CARNEY, individually and as a member of the Board of Education, CAROL KILLION, individually and as a member of the Board of Education, FRANCIS VALENZUELA, individually and as a member of the Board of Education, DAVID EICHENHOLTZ, individually and as an officer of the Board of Education, THOMAS TUSCANO, individually and as a member of the Palisades Park Republican Club, SUSAN GIACOBONE, individually and as an executive member of the Palisades Park Republican Party, CARMINE VERDICCHIO, individually and as Lead Custodian of the Board of Education, JAMES NICHOLS, individually and as a officer of the Board of Education, MATTHEW NICHOLS, individually and as a member of the Board of Education, GEORGE FASCIANO, individually and as Superintendent of Board of Education, PETER MAROSE, individually and as a member of the Board of Education, and SMITH, DON, ALAMPI & D'ARGENIA, individually and as counsel for the Board of Education,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENTS, BOROUGH OF PALISADES PARK, WILLIAM MARESCA and PAUL ALBANESE

SHARON HANDROCK MOORE, Esq.
Counsel of Record
GEBHARDT & KIEFER, P.C.
1318 Route 31, P.O. Box 4001
Clinton, New Jersey 08809
(908) 735-5161
SHARON HANDROCK MOORE
On The Brief

JOSEPH J. ROTOLO, Esq.
50 Summit Avenue
Hackensack, New Jersey 07601
(201) 343-0088
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether it is a denial of due process and trial by jury to apply Rule 56 summary judgment procedure consistent with accepted case law precedent.

II. Whether political affiliation constitutes a suspect class under 42 U.S.C. §1985(3).

III. Whether it was an abuse of discretion under 28 U.S.C. §1367 to dismiss state law claims without prejudice after dismissal of the federal claims.

IV. Whether Summary Judgment for Defendants was appropriate where the record fails to show that constitutionally protected conduct was a substantial and motivating factor in an employment decision and rather that the action was motivated by a legitimately perceived need to reduce budget.

V. Whether a state election by secret ballot supports application of a political vote witness privilege.

VI. The question raised by petitioner concerning dismissal as to non-moving Defendants does not apply to the Borough of Palisades Park, William Maresca and Paul Albanese, moving Defendants, and will not be addressed herein.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

Overview 1

Plaintiff's Employment as a Custodian 4

The 1992 School Board Election and Budget Process 5

The Evidential Record Did Not Support Plaintiff's Claims 10

Plaintiff's Factual Assertions Are Not Supported By Evidence In The Record 13

REASONS FOR DENYING THE WRIT 17

Introduction 17

SUMMARY OF ARGUMENT 18

ARGUMENT 19

I. PETITIONER WAS NOT DENIED FIFTH AMENDMENT DUE PROCESS AND SEVENTH AMENDMENT TRIAL BY JURY BECAUSE THE LOWER COURTS DID PROPERLY APPLY SUMMARY JUDGMENT UNDER F.R.C.P. 56 AND CASE PRECEDENT 19

A. The Court Followed Authority Under F.R.C.P. 56 19

TABLE OF CONTENTS – Continued

Page

B. 42 U.S.C. §1985(3) Was Correctly Applied ... 22

C. The Dismissal of The Pendent Jurisdiction State Law Claims Was Within The Discretion Of The District Court 24

II. PETITIONER WAS NOT DENIED FIFTH AMENDMENT DUE PROCESS AND SEVENTH AMENDMENT TRIAL BY JURY BY APPLICATION OF AN IMPROPER PROOF METHODOLOGY IN AN ALLEGED POLITICAL RETALIATION CASE 26

III. PETITIONER WAS NOT DENIED FIFTH AMENDMENT DUE PROCESS BY APPLICATION OF A POLITICAL VOTE PRIVILEGE AGAINST DEPOSITION QUESTIONS OF A NON-PARTY WITNESS INQUIRING ABOUT HER VOTE IN A SCHOOL BOARD ELECTION 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Aetna Life Insurance Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 81 L.Ed. 617, 57 S.Ct. 667 (1936) 29

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986) 19

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 122 L.Ed.2d 34, 113 S.Ct. 753 (1983) 22

Cases Office Machs., Inc. v. Mita Copystar Am., Inc., 42 F.3d 668 (1st Cir. 1994) 21

Celotex Corp. v. Catrett, 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986) 19

Childree v. UAP/GA AG Chem., Inc., 92 F.3d 1140 (11th Cir. 1996) 23

D'Aurizio v. Borough of Palisades Park, 899 F.Supp. 1352 (D.N.J. 1995) 1, 28

D'Aurizio v. Palisades Park, 963 F.Supp. 386 (D.N.J. 1997) 1

Deblasio v. Zoning Bd. of Adjustment of Twp. of West Amwell, 820 F.Supp. 876 (D.N.J. 1993), *rev'd on other grounds*, 53 F.3d 592 (3d Cir. 1993), *cert. denied*, 116 S.Ct. 352 (1995) 23

Filco v. Amana Refrigeration, Inc., 709 F.2d 1257 (9th Cir. 1983), *cert. dismissed*, 464 U.S. 956, 78 L.Ed.2d 331, 104 S.Ct. 385 (1983) 22

Franks v. Magnolia Hosp., 888 F.Supp. 1310 (N.D. Miss. 1995), *aff'd*, 77 F.3d 478 (4th Cir. 1996) 25

Gary v. Long, 59 F.3d 1391 (D.C. Cir. 1995), *cert. denied*, 133 L.Ed.2d 493, 116 S.Ct. 569 (1995) 25

Griffin v. Breckenrich, 403 U.S. 88, 29 L.Ed.2d 338, 91 S.Ct. 1970 (1971) 23

TABLE OF AUTHORITIES – Continued

Page

Irish Lesbian and Gay Organization v. Bratton, 882 F.Supp. 315 (S.D.N.Y. 1995), *aff'd*, 52 F.3d 311 (2d Cir. 1995) 25

Johnson v. Cullen, 925 F.Supp. 244 (D.Del. 1996)..... 25

Jones v. Owens-Corning Fiberglass Corp., 69 F.3d 712 (4th Cir. 1995)..... 21

Mark v. Borough of Hatboro, 856 F.Supp. 966 (E.D.Pa. 1994), *aff'd*, 51 F.3d 1137 (3d Cir. 1994), *cert. denied*, 133 L.Ed.2d 107, 116 S.Ct. 165 (1995) 25

McCullough v. Branch Banking & Trust Co., 844 F.Supp. 258 (E.D.N.C. 1993), *aff'd*, 35 F.3d 127 (4th Cir. 1994), *cert. denied*, 130 L.Ed.2d 1069, 115 S.Ct. 1101 (1995) 25

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973)..... 26

Mt. Healthy City School District Bd. of Edu. v. Doyle, 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977) 27

Rainero v. Antus, 943 F.Supp. 413 (D.N.J. 1996) ...27, 28

Robertson v. Fiore, 62 F.3d 596 (3rd Cir. 1995).....27, 28

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993) 26, 27

Starr v. Pearle Vision, Inc., 54 F.3d 1548 (10th Cir. 1995)..... 20

United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. 825, 77 L.Ed.2d 1049, 103 S.Ct. 3352 (1983) 22, 23

United States v. Petersen, 611 F.2d 1313 (10th Cir. 1979), *cert. denied*, 447, U.S. 905, 64 L.Ed.2d 854, 100 S.Ct. 2985 (1980) 21

TABLE OF AUTHORITIES – Continued

Page

Wexley v. Michigan State, 821 F.Supp. 479 (W.D. Mich. 1993), *aff'd*, 25 F.3d 1052 (6th Cir. 1994)..... 25

World of Sleep, Inc., v. La-Z-Boy Chair Co., 756 F.2d 1467 (10th Cir. 1985), *cert. denied*, 474 U.S. 823, 88 L.Ed.2d 63, 106 S.Ct. 77 (1985)..... 22

RULES AND REGULATIONS

U.S.S.C. Rule 10..... 24

U.S.S.C. Rule 10(a)..... 17

U.S.S.C. Rule 10(c)..... 17

F.R.E. 501..... 29

F.R.E. 507..... 29

F.R.E. 801..... 21

F.R.E. 803.8..... 20

F.R.C.P. 56.....17, 19

STATUTES

28 U.S.C. §1254(1)..... 1

28 U.S.C. §1367..... 24

28 U.S.C. §1367(c)(3)..... 24

42 U.S.C. §1985(3).....18, 22

N.J.S.A. 10:5-1, et seq..... 24

N.J.S.A. 18A:14-1..... 14

N.J.S.A. 18A:22-37..... 8

OPINIONS BELOW

Petitioner's Appendix includes all opinions below. In addition, the District Court's opinion on the political vote privilege is reported at *D'Aurizio v. Palisades Park*, 899 F.Supp. 1352 (D.N.J. 1995) and one of the District court's companion opinions on the remaining issues is reported at *D'Aurizio v. Palisades Park*, 963 F.Supp. 386 (D.N.J. 1997).

STATEMENT OF JURISDICTION

Jurisdiction is pursuant to 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The citations set forth in the Petition set forth the provisions relevant to the issues presented by the Petition.

STATEMENT OF THE CASE

Overview

Plaintiff Albert D'Aurizio was employed by the Palisades Park School Board (hereafter School Board) as a full time custodian beginning in August, 1991. Prior to that he was a candidate for a position on the Palisades Park Borough Council and lost the election in November, 1991. It should be noted that a School Board under New

Jersey law is a separate governmental entity which operates the local school district apart from the municipal corporation. In April, 1992, the voters defeated the school budget and the Council met regarding whether the School Board could cut the budget. Under New Jersey law, in the event of voter defeat of a school budget, the municipal governing body reviews the budget and suggests reductions; if the School Board does not agree, it may appeal to the State Commissioner of Education. Plaintiff alleged two secret meetings in April and in June, 1992, where a conspiracy is alleged in which Plaintiff claims it was agreed to have Plaintiff discharged because he had run for election to the Palisades Park Borough Council. On June 2, 1992, the School Board notified Plaintiff that his job would be discussed at a June 9 meeting. At that meeting, the School Board voted to eliminate one custodian and two maintenance positions, resulting in Plaintiff's termination.

There was extensive discovery in the District Court proceeding followed by Summary Judgment Motions by the various Defendants, including the Borough, Mayor Maresca and Councilman Albenese. Summary Judgment was granted on all federal claims in an opinion filed April 29, 1997. (Petitioner's Appendix, 23A to 37A). The District Court opinion dealt extensively with the factual record and granted Summary Judgment finding that the facts that could be established by that record were insufficient to support the essential elements presented by Plaintiff as a basis for his claims. It noted in part:

> " . . . D'Aurizio fails to provide the Court with sufficient evidence – i.e., creating a genuine issue as to a material fact – to support a claim

that the Borough officially adopted an unconstitutional policy to terminate D'Aurizio because of his political association. . . .

D'Aurizio's claim that the Board fired him because of his political association is without merit. . . . D'Aurizio's evidence amounts to no more than conclusionary allegations that he spoke to two individuals, one of whom was his sister-in-law, who told him the defendants secretly met and conspired to eliminate his custodial position with the Board. . . . defendants provide the Court with ample documentary and testimonial evidence demonstrating that the Borough's April 27 Budget Resolution . . . as well as the Board's prior cuts to the budget, were motivated by nothing more than a legitimately perceived need to reduce the school budget. . . .

. . . even if D'Aurizio could prove the conspiracy and injury elements of his 1985(3) claim against the defendants, he does not allege that the defendants' actions were motivated by 'racial or other class-based invidiously discriminatory animus.' Rather, here D'Aurizio is merely claiming that the defendants conspired against him, individually, because of his political association. Accordingly, D'Aurizio's section 1985(3) claim against the defendants is dismissed. . . .

. . . D'Aurizio's section 1986 claim . . . fails both because (1) he does not state a valid section 1985(3) claim against the defendants and (2) he waited for more than one year to file his claim. . . . " (Petitioner's Appendix, 30a, 31a, 32a, 33a).

The District Court dismissed the state law claims by declining pendent jurisdiction after dismissal of the federal claims. (Petitioner's Appendix, 34a). The Third Circuit affirmed on appeal all the rulings of the District Court by Order filed May 7, 1998 (Petitioner's Appendix, 1a, 2a, 3a). A review of the record in this case amply supports the decision of Judge Greenaway in the U.S. District Court, and the affirmance by the Third Circuit.

Although Plaintiff, Albert D'Aurizio, alleged a massive conspiracy of government officials, including his own sister-in-law, to remove him from his custodial position with the Board of Education, he was unable, despite extensive document discovery and the depositions of fifteen witnesses over thirty-two days, to come forward with even a scintilla of competent evidence that supported his claims. Indeed, most of the factual citations in his Petition for Certiorari are from nothing more than his own declaration before the District Court, which had insufficient factual foundation and relied heavily on personal belief, hearsay and incompetent evidence. Every citation in the Petition between A1478 and A1494 falls within this category.

Plaintiff's Employment as a Custodian

Plaintiff is a member of a large and politically active family in Palisades Park. For years, they participated in the Republican Club and School Board politics. Plaintiff's sister-in-law, Carol Killion, was President of the Board of Education. In early 1991, Plaintiff announced his candidacy as an independent for a seat on the Borough Council. In order to run as an independent, he changed

his party affiliation from a Republican to an Independent and resigned from the Palisades Park Republican Club sometime around April, 1991. (PPA168,169; "PPA" refers to the Borough's Appendix before the Court of Appeals). On May 29, 1991, after his decision to run as an independent had been made public, Plaintiff, whose sister-in-law was President of the Board of Education, was hired by the Board as a part time custodian. According to Plaintiff's deposition testimony, in May of 1991, Mayor Maresca contacted Plaintiff's wife suggesting Plaintiff drop out of the Council race. (PPA170). Despite Mayor Maresca's concern as expressed to Plaintiff's wife, Plaintiff was appointed to a part time custodial position. At Plaintiff's request, his sister-in-law, Mrs. Killion, set up a meeting between Mayor Maresca and Plaintiff to resolve this matter. Plaintiff claimed Maresca promised him a full time position with the Board of Education if he dropped out of the race, an offer Plaintiff said he refused. (PPA171, 173, 175). Nevertheless, Plaintiff became a full time custodian by vote of the Board of Education on August 27, 1991, demonstrating that his campaign for office did not prevent his obtaining that employment. As noted, he was a candidate prior to his hiring as a custodian and the election in which Plaintiff was a candidate for Municipal office was in November, 1991.

The 1992 School Board Election and Budget Process

Within months of Plaintiff becoming a full time employee of the Board of Education, it became apparent that, as the last-hired custodian, his job was jeopardized by proposed budget cuts. Candidates known as the CARE candidates ran on a platform involving the reduction of

the budget for non-essential expenses. (PPA222A). Plaintiff and other custodians recognized this and prepared a flyer against the CARE candidates and picketed the election. (PPA166). Contrary to Plaintiff's assertions, the proposed budget cut which would eliminate the last hired custodial position was in place long before any member of the Borough became involved in the budget process. Although Plaintiff alleges he was individually targeted for dismissal for political reasons, he never offered an iota of proof and created an April conspiracy out of whole cloth. The budget cuts that would affect Plaintiff's position occurred long before any conspiracy period alleged by Plaintiff. Preparation of the budget for the 92-93 school year began long before the April and June, 1992 conspiracy alleged by Plaintiff, in December, 1991 or January, 1992, when an initial draft budget was prepared by Board Administrator, David Eichenholtz. This initial document did not propose any budget cuts whatsoever, and, therefore, included the salaries of all custodians then on the staff. (PPA210,211). A list of custodial salaries produced by former School Board Finance Chair, Linda Sherwood, showed total salaries of $445,163.26 for the custodians then on staff, all of whom are identified by name. (PPA72). The preliminary budget prepared by Mr. Eichenholtz showed that this full amount was included in the first draft budget. (PPA146,147,148).[1]

---

[1] In all Palisades Park Board of Education budget references herein, custodial salaries are reflected in the budget at line 610. In some budget documents, this is further broken down into sub-accounts 6101 (regular salaries), 6102 (part time salaries) and 6103 (overtime and extra help salaries). There was also a separate category for maintenance salaries, which are reflected at line 710 or 7100.

At a budget work session on February 4, 1992, cuts were made to this preliminary budget, including the elimination of one custodial and two maintenance positions. (PPA217,218). These cuts of $30,000.00 in custodial salaries and $60,000.00 in maintenance salaries were reflected on a spread sheet prepared by Mr. Eichenholtz. (PPA59-70; PPA212-213). Review of the spread sheet revealed that although line item 6101, at $480,163.00 appears greater than that shown on the initial draft budget prepared by Mr. Eichenholtz, which was $445,163.00 (PPA148), the supporting worksheet (PPA72) indicated that this $35,000.00 increase represented the addition of a Director of Maintenance position which was later eliminated as well. The February budget cuts are also reflected in the first of several budgetary submissions made by the Board of Education to the County Superintendent of Education on February 10, 1992. Current and budgeted personnel included with this submission clearly showed a reduction of one custodian (from 15 to 14) and two maintenance employees (from 4 to 2) from the then current staffing level (PPA11). Plaintiff was the custodian with the least seniority, thus his job was the one eliminated on February 4, 1992 – well before the conspiracy he alleges took place in April and June and whether he was identified by name or not.

Further cuts were made in the budget at the March 17, 1992 public hearing held by the Board of Education, but none of those cuts involved custodial or maintenance salaries, other than an additional $7,000.00 reduction in overtime funding. (PPA74-75). Plaintiff's contentions below that the budget finalized for the election on March

17, 1992 contained an increase in the custodial maintenance (line item 610) from $448,500.00 the prior year to $505,163.00 for the upcoming year, thus creating an inference that there was no budget shortage, was a mischaracterization of the budget documents and testimony of the participants in the budget process. Even though the number cited by Plaintiff $505,163.00 is an increase over the 1991-1992 budget amount, the increase was insufficient to cover the two additional custodians that had been hired (the last of which was Plaintiff) and the new Director of Maintenance position that was budgeted for $35,000.00. The salaries of the custodians then on staff totaled $445,163.36. (PPA72). There was also a total of $55,000.00 allotted for part time and extra help and $35,000.00 for the new position of Director of Maintenance. (PPA80). Thus, the total no-layoff amount for line item 610 was $535,163.00 ($35,000.00 + $445,163.00 + $55,000.00). By the time of the March 17 meeting, it had already been cut by $30,000.00, representing the elimination of one position, during the School Board's February meeting. This is evidenced by the Board's submission to the County Superintendent (PPA11, PPA24) and by the Business Administrator's budget recap submitted to the Borough Council. (PPA 59-70). These costs were incorporated into a revised budget submitted to the County Superintendent of Education and also presented to the voters at the April 7, 1992 school election. The budget finally presented to the voters was $117,500.00 less than the second draft budget of February 10, 1992, but still higher than the 91-92 school budget. At the school election on April 7, 1992, the budget was defeated. Thereafter, as mandated by N.J.S.A. 18A:22-37, the Board of

Education and the Borough Council held two meetings, the first on April 22, 1992 and the second on April 26, 1992 to discuss the budget and ways in which it could be further reduced. These were open meetings[2] not held in secret or involving any furtive purpose as suggested by Plaintiff, and are recited in the Borough's Budget Resolution adopted at an open public meeting on April 27, 1992. (PPA102-109). This Resolution proposed a total of $579,000.00 in cuts, including two additional custodial positions, the elimination of a position held by a third custodian who would apparently not be returning to work, and the elimination of the newly created Director of Maintenance position and its salary of $43,000.00. (PPA102-109).

These cuts were accepted by the School Board at its next open public meeting and the final budget was submitted to the County Superintendent of Education on June 2, 1992. (PPA42-57). The final budget reflected a reduction in custodial salaries (line 610) to $335,163.00 and maintenance salaries (line 710) to $96,663.00. This is down from the original no-layoff amounts of $480,163.00 for custodians and $156,663.00 for maintenance workers. The final numbers reflected cuts totaling $205,000.00 and the elimination of a total of five positions – two maintenance (both cut in February, 1992) and three custodians (the least senior cut in February and the next two lowest in seniority in April) – as well as the vacant position and the Director of Maintenance position. On June 9, 1992, the Board of Education began implementing the budget cuts

---

[2] The April 26, 1992 meeting was a only a sub-committee meeting which was held on a Sunday evening in Borough Hall.

by laying off Plaintiff and two maintenance workers. (PPA144).

This budget process does not raise any disputed material facts and demonstrated that Plaintiff's job had already been eliminated from the budget in February; that further cuts were made after the budget was defeated; and that the Borough Defendants played no role in the school budget process until after the budget was defeated on April 7, 1992 by the voters. The allegations of conspiracy simply set forth in a declaration of the Plaintiff could not be supported by an evidential record.

The Evidential Record Did Not Support Plaintiff's Claims

Plaintiff has asserted that the 1992 budget cuts were merely a pretext for the elimination of his position. His Complaint alleged that two "conspiracy meetings" took place in April and June, 1992, at which Republican members of the Board of Education and others plotted to eliminate his position in retaliation for his 1991 independent candidacy for Borough Council. (PPA225-226). The discovery and the record produced has provided no competent evidence to support this theory. For example, as to the April meeting, Plaintiff testified that Mrs. Killion called him at 8:00 a.m. the day after the meeting. All she told him, however, was that School Board Attorney Berek Don was going to "move" him to the County. (PPA180). The only other information Plaintiff had on this meeting was a statement made by Defendant Marose, again to the effect that he had heard Plaintiff was being moved to the County (PPA181-182). Plaintiff admitted that he had no knowledge of what occurred at the April meeting other

than what he could surmise from those conversations. (PPA181-182). Speculation aside, Plaintiff's testimony is fully consistent with the legitimate purpose of the April 26, 1992 meeting which was to discuss cuts in the defeated school budget. According to Ms. Killion, as well as others, the meeting was held at Borough Hall, was open to the public, and was for the purpose of discussing the budget. (PPA188-189). It was openly memorialized in the Council's April 27 Resolution. (PPA102-109). Carol Killion testified that after this meeting she spoke to her sister, Mrs. D'Aurizio, because she knew that budget cuts imperiled her brother-in-law's job. She told Mrs. D'Aurizio that she was going to try to get Plaintiff another job. (PPA190-191). The June meeting was similarly legitimate rather than part of any conspiracy. It was a Republican meeting held to discuss the appointment of Frank Valenzuela to the Board of Education. (PPA196-204). Plaintiff's name was not even mentioned, other than by Ms. Killion in a side conversation with Paul Albanese in which she entreated him to try to do something to save Plaintiff's job, saying: "Paul, Paul, come on, this is my brother-in-law." (PPA187). Mr. Albanese's response was "well, fire them all." *Id.*[3] Plaintiff's own testimony regarding this meeting showed that his allegations are again based on nothing more than his own speculation. He testified that his wife spoke to Mrs. Killion the night of the meeting after seeing her car outside the law firm of Rotolo and Rotolo, at which the

---

[3] In order to "save" Plaintiff's job, since he had the least seniority of any custodian or maintenance worker, all of the laid off workers would have had to remain for Plaintiff to be retained.

meeting was held. (PPA177). Plaintiff specifically denied being told by Mrs. Killion what had occurred at that meeting. (PPA178). He stated that he did not know what it was about until he read a complaint filed against the Board of Education by the former Director of Maintenance. *Id.* Plaintiff did assert at his deposition that Mrs. Killion confirmed his understanding of this meeting, but he could not remember how. (PPA178-179). In fact, Plaintiff could not even remember if he talked to Mrs. Killion about it. (PPA179). As for Mrs. Killion, she testified, under leading questioning from Plaintiff's attorney, to a "belief" that Plaintiff may have been terminated because he ran against the Republican party but was able to offer nothing to support such a belief. (PPA205-208). Her own testimony indicates, time after time, her own uncertainty over the truth of this belief.

> "My personal belief is it's a possibility. It could have been. I don't know . . . Yes, I believe it could be true, yes. That's the only answer I can give you. (PPA206).

In reality, the only "facts" relied upon in support of Plaintiff's conspiracy theory are nothing more than Carol Killion's efforts to keep her brother-in-law employed once she learned his job was jeopardized by School Board cuts. In addition to approaching Paul Albanese on June 7, she asked Board attorney Berek Don to arrange for a job with the County. (PPA190). She approached Mayor Maresca and asked if he could "help me out a little bit." (PPA186). The failure to adequately provide substitute employment for her brother-in-law, presumably through some government position, is now cited as evidence of their complicity in the alleged conspiracy. Furthermore,

all of Plaintiff's surmise and conjecture about conspiracy meetings in April and June, 1992 are irrelevant because the funding for Plaintiff's position, as the custodian/ maintenance worker with the least seniority, was already eliminated in February, 1992.

Plaintiff's Factual Assertions Are Not Supported By Evidence In The Record

The Petition recites an alleged factual scenario for a conspiracy to terminate Plaintiff from his custodian position at a school operated by the School Board, but presents numerous assertions that are not supported by evidence or are misstatements or overstatements when compared with the evidence. In fact, much of the factual scenario is based upon nothing more than an unsupported account of alleged facts which Plaintiff merely certified as true in a declaration, but without any evidential support in the record other than Plaintiff's beliefs. For example, on pages 4 and 5 of the Petition, Plaintiff creates the impression that after his appointment to a custodian position in August 1991, he announced his independent candidacy for Borough Council, angering officials and leading to the alleged conspiracy to terminate him from his employment. This is misleading because the record shows that Plaintiff began his candidacy as early as the Spring of 1991 and that he received his full time appointment as a custodian in August, 1991 after it was well known that he was a candidate for elective office. Thus, the actual record does not present the hostility between the candidacy and the employment that the Petition seeks to convey. The Petition at page 5 suggests that School Board candidates from the CARE group, which advocated

reductions in the school budget, ran a political campaign to eliminate patronage positions, when state law required non partisan campaigns. In fact, New Jersey law applicable at the time, N.J.S.A. 18A:14-1, did not allow grouping of candidates or party designation on the ballot, but did not and could not prohibit candidates from taking the political position that the desirable policy was to reduce the budget or eliminate patronage positions. There was nothing wrongful about any candidate having and expressing such views. Every election is political in that persons seek positions of power to advance certain policies. The Petition at page 6 charges that Linda Sherwood prepared a hit list in March of 1992 indicating jobs to be terminated. The citations in support of the assertion refer to Plaintiff's declaration of "facts" and a copy of the document. No evidence supports it was a hit list prepared in March 1992. Sherwood was deposed. She was questioned about the document. Plaintiff never included that part of her deposition in the record, nor did he ever cite it because it did not support his "hit list" prepared in March, 1992 theory. It contradicted his theory. For the purpose of this record and Plaintiff's Petition, the allegation of a March, 1992 hit list is unsupported by the evidence, and Plaintiff's certified declaration on this point was never anything more than a bald allegation. On page 7 of the Petition, Plaintiff indicates that neither the School Board nor Borough undertook any budgetary review before adopting a school budget cutting resolution. The "evidence" referenced for this conclusion was again nothing more than Plaintiff's declaration simply making an allegation and then contending it is evidence. If one considered actual evidence such as the School

Board Budget Resolution, an official government document, which Plaintiff cites as Exhibit E, and which is in the Borough's Appendix before the Court of Appeals (PPA102 to PPA109), one would discover a Resolution dated April 27, 1992 reciting (1) the budget election defeat; (2) a joint meeting of April 22, 1992 of the Borough Council and Board of Education to review the budget; (3) an effort to reduce the budget by $579,000.00; (4) specific amounts to reduce certain items; (5) and in the area of plant operation, elimination of the Director of Maintenance position, eliminate two positions from custodial staff, and other detailed reductions. At page 8 of Plaintiff's Petition, a conspiratorial meeting is alleged, but with no cited proof except another reference to Plaintiff's declaration in which he simply makes an allegation. The record contains no testimony or other evidence establishing the occurrence of such a meeting involving a conspiracy to terminate Plaintiff because he sought elective office. At page 8 of the Petition, Plaintiff claims his sister-in-law Killion testified in another law suit that a political deal had been struck between Republican Factions concerning Plaintiff's termination. However, the citation in the Petition to the deposition of Killion included in the Plaintiff's Appendix before the Court of Appeals (A1519 to 1521) contains no such reference. At page 13 of the Petition, Plaintiff refers to the deposition of Killion, in the record in his Appendix before the Court of Appeals at A1552, as quoting Councilman Albanese stating "fire him", referring to Plaintiff. In fact, the deposition reference in the record reports Albanese stating "fire them all" referring to all the custodians. This would tend to prove a motivation of general budget reduction rather than a

singling out of Plaintiff for political reasons and represents a misstatement of the record in the Petition. Also at page 13 of the Petition, Plaintiff concludes his version of events is undisputed. What the record actually demonstrates indisputably is that Plaintiff's version of events is unsupported by any competent evidence and was based upon his own certified declaration which, in reality, was nothing more than allegations and beliefs certified to be true, but based upon no competent evidence.

The District Court opinion recognized the actual worth of Plaintiff's factual contentions. The Court noted that Plaintiff announced his candidacy for Council in April, 1991 and was nevertheless subsequently appointed as a full time custodian in August, 1991; that his belief in secret conspiratorial meetings came only from alleged conversations with his sister-in-law, which was not confirmed by her at her deposition; and that documentary evidence demonstrated that the budget cuts were motivated by a perceived need to reduce the school budget. (Petitioner's Appendix 24a, 25a, 26a). This case does not present a factual scenario established by competent evidence for a framework for certiorari review of political retaliation legal standards and precedent. Rather, it is only an example of a case alleging constitutional violations which allegations could not be established by competent evidence after extensive discovery, and which fell back upon no more than a Plaintiff's theoretical allegation in the form of a certified declaration without competent support.

REASONS FOR DENYING THE WRIT

Introduction

Petitioner's application for a writ of certiorari should be denied for the following reasons under Rule 10 of the Supreme Court Rules.

1. The Third Circuit affirmed the District Court's granting of Summary Judgment to Defendants applying accepted and usual standards under F.R.C.P. 56 and related case law, requiring no need for an exercise of the Supreme Court power of supervision. Rule 10(a).

2. The decision of the Third Circuit was not in conflict with the decisions of other United States Courts of Appeals and applied accepted law and methodology, requiring no need for the Supreme Court's power of supervision. Rule 10(a).

3. The Third Circuit has decided an issue of alleged political retaliation in a manner consistent with existing precedent and accepted methodology and not in conflict with applicable decisions of the Supreme Court, requiring no need for the Supreme Court to settle an important issue of federal law. Rule 10(c).

4. The Third Circuit has appropriately determined the application of a political vote privilege to discovery seeking information on how a witness voted in a local secret ballot election, which was based upon a discovery controversy in the case, was not an advisory opinion, requiring no need for an exercise of the Supreme Court's power of supervision. Rule 10(a).

SUMMARY OF ARGUMENT

1. The Summary Judgment procedure was correctly applied to a record where Plaintiff's proofs were not competent and admissible evidence and were based upon mere belief and conjecture, whereas the Defendant's proofs were admissible official records and deposition testimony.

2. The ruling was sound that a political independent and outsider did not qualify as part of a class under 42 U.S.C. §1985(3).

3. Discretion was not abused by a dismissal without prejudice of state law claims under 28 U.S.C. §1367, after dismissal with prejudice of all federal claims.

4. The proper proof methodology and Summary Judgment procedure was applied to the political retaliation claims.

5. The application of a political vote witness privilege to a non-party witness' vote in a state secret ballot election was consistent with law and public policy.

ARGUMENT

I. PETITIONERS WAS NOT DENIED FIFTH AMENDMENT DUE PROCESS AND SEVENTH AMENDMENT TRIAL BY JURY BECAUSE THE LOWER COURTS DID PROPERLY APPLY SUMMARY JUDGMENT UNDER F.R.C.P. 56 AND CASE PRECEDENT

A. The Court Followed Authority Under F.R.C.P. 56

This District Court was both well aware of and correctly applied the Summary Judgment standard. Summary Judgment is appropriate when the moving party demonstrates that there is no genuine issue of material fact and that the evidence establishes the moving party's entitlement to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L.Ed.2d 265. 273, 106 S.Ct. 2548 (1986). Summary Judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of his case. *Id.* 477 U.S. at 322, 91 L.Ed.2d at 273, 106 S.Ct. at 2552. The party opposing Summary Judgment cannot rest on mere allegations and must instead present actual evidence that creates a genuine issue as to a material fact for trial. The mere existence of a scintilla of evidence in support of the Plaintiff's position will be insufficient to oppose a Summary Judgment Motion. If reasonable jurors could not find by a preponderance of the evidence that the Plaintiff is entitled to a verdict, Summary Judgment should be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 252, 91 L.Ed.2d 202, 211-12, 214, 106 S.Ct. 2505 (1986). The District Court clearly cited the law in this regard correctly and there can be no claim that the law

applicable was somehow misstated. (Petitioner's Appendix 27a).

Plaintiff claims certain defendants did not file a Local Rule 12G statement, but concedes Respondents did. Thus, Plaintiff's argument on that point is inapplicable. The record below relied upon by Respondents in support of their Summary Judgment Motion consisted of about 200 pages of excerpts from depositions of various witnesses and official documents from governmental entities, which had been identified in various depositions. The documents and depositions filed with the District court were certified as true copies of originals by a certification of counsel. Plaintiff argues at pages 18 and 19 of his Petition that all of this record was inadmissible hearsay and should not have been considered as evidential, citing *Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1555 (10th Cir. 1995). That case addressed the use of inadmissible hearsay contained in depositions as evidence to be considered in a Summary Judgment Motion. The ruling does not stand for the proposition that true copies of the witness' *non hearsay* testimony at the deposition or true copies of official government documents admissible at trial through F.R.E. 803.8 cannot be relied upon in a Summary Judgment proceeding. Clearly, the court can consider testimony at depositions, if the witness could so testify at trial, in a Summary Judgment Motion. If it were not so, a Summary Judgment Motion would require live testimony, defeating the purpose of the procedure. Plaintiff's Petition does not challenge the authenticity of the copies of the official records and excerpts of deposition testimony presented nor did Plaintiff raise such an objection below. If a party objects to evidential material presented in a

Summary Judgment Motion, he must move to strike them before the District Court or waive these types of arguments on appeal. *Jones v. Owens-Corning Fiberglass Corp.*, 69 F.3d 712, 718 (4th Cir. 1995); *Cases Office Machs., Inc. v. Mita Copystar Am., Inc.*, 42 F.3d 668, 682 (1st Cir. 1994).

Petitioner contends that alleged admissions of Killion concerning a conspiracy to fire Plaintiff because of his political activities in running for office are binding upon all co-conspirators and are exceptions to hearsay rules under F.R.E. 801. However, the hearsay version of events alleged to have been stated by Killion were not confirmed by her when she was deposed. As previously noted, she never made any admission statement to Plaintiff other than a personal belief, a possibility, but not a revelation of actual knowledge. (PPA206). Plaintiff himself could not confirm how or when Killion made any statements on the subject and was unsure whether he talked to her about these subjects. (PPA178, PPA179). The evidential foundation for even consideration of these allegations as admissible hearsay exceptions was, therefore, never reached. If there were evidential admissions of Killion, they would not be admissible against other Defendants absent co-conspirator status. That status is not achieved simply because Plaintiff alleges it exists. In order to apply hearsay admissions against others, the party seeking admission must show by competent and independent evidence that it is more likely than not that (1) the conspiracy existed; (2) the declarant and the Defendant against whom the conspirator's statement is offered were members of the conspiracy; and (3) the statement was made during the course of and in furtherance of the conspiracy. *United States v. Petersen*, 611 F.2d 1313, 1330 (10th Cir.

1979), *cert. denied*, 447 U.S. 905, 64 L.Ed.2d 854, 100 S.Ct. 2985 (1980). This Rule applies to both civil and criminal cases. *Filco v. Amana Refrigeration, Inc.*, 709 F.2d 1257, 1267 (9th Cir. 1983), *cert. dismissed*, 464 U.S. 956, 78 L.Ed.2d 331, 104 S.Ct. 385 (1983). Such a conspiracy must be shown by substantial independent evidence, which means more than a mere scintilla. *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir. 1985), *cert. denied*, 474 U.S. 823, 88 L.Ed.2d 63, 106 S.Ct. 77 (1985). Plaintiff cannot establish a conspiracy by reference to an alleged hearsay admission of a party, and then attempt to use that alleged statement to prove others are co-conspirators upon whom the alleged admission can be evidentially asserted. As noted *supra* and in the District Court's opinion below, there was insufficient evidence on this point.

B. 42 U.S.C. §1985(3) Was Correctly Applied

Petitioner argues that 42 U.S.C. §1985(3) applies to political independents as a protected class. One of the elements of a deprivation cause of action under this provision of the Civil Rights Act is a purpose of depriving a class of persons of equal protection or equal privileges and immunities under the laws. *Id.; United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 828-29, 77 L.Ed.2d 1049, 1054, 103 S.Ct. 3352 (1983). A Plaintiff must prove some racial or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' action. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268-69, 122 L.Ed.2d 34, 45, 113 S.Ct. 753 (1983). The provision was not intended to apply to all tortious,

conspiratorial interference with the rights of others or to be a general federal tort law. *Griffin v. Breckenrich*, 403 U.S. 88, 101-02, 29 L.Ed.2d 338, 348, 91 S.Ct. 1790 (1971). The present case involves no more than alleged action against the activities of an individual. It is difficult to construe the statute as intended to provide a remedy for every concerted effort by one political group to nullify the influence of or do other injury to a competing group or individual by use of otherwise unlawful means. *United Brotherhood of Carpenters & Joiners v. Scott, supra*, 463 U.S. at 836, 77 L.Ed.2d at 1059. Class unquestionably connotes something more than a group of individuals who share a desire to engage in conduct the defendant disfavors, or certainly a lone individual. For example, whistle blowers do not constitute a class; women seeking abortion are not a class; and bankrupts are not a class. It was intended to apply to classes offered special protection under the equal protection clause and classes Congress was trying to protect when it enacted the Ku Klux Klan Act. *Childree v. UAP/GA Ag Chem., Inc.*, 92 F.3d 1140, 1146-47 (11th Cir. 1996). It should not be applied to political outsiders or independents as a class. *Deblasio v. Zoning Bd. of Adjustment of Township of West Amwell*, 820 F.Supp. 876, 885 (D.N.J. 1993), *rev'd on other grounds*, 53 F.3d 592 (3d Cir. 1993), *cert. denied*, 116 S.Ct. 352 (1995). The holding in this case is not inconsistent with the prior opinions of the Supreme Court and does not constitute circumstances calling for Supreme Court review.

C. The Dismissal of The Pendent Jurisdiction State Law Claims Was Within The Discretion Of The District Court

Plaintiff claims at I.D., pages 24-26 of the Petition that the lower courts misapplied the supplemental jurisdiction statute, 28 U.S.C. §1367, in dismissing the state law claims after granting Summary Judgment on all of the federal civil rights claims. The state law claims involve a claim under the State Law Against Discrimination, N.J.S.A. 10:5-1 et seq. and a claim of tortious interference with an employment relationship. The statute applicable states in relevant part:

> "(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –
>
> (3) the district court has dismissed all claims over which it has original jurisdiction . . . " 28 U.S.C. §1367(c)(3).

Plaintiff has filed a Complaint in state court subsequent to the dismissal of his federal action. He does not indicate in his Petition why pursuit of these state law claims in state court would be prejudicial or unfair to him. Nor does he indicate any reason why it would be an abuse of the District Court's discretion to have dismissed these claims without prejudice after the federal civil rights claims were dismissed with prejudice. The Petition simply suggests the wording of the opinion below may have applied a stricter standard than the exercise of discretion. Unless the circumstances of this case demonstrated such an abuse of discretion under the supplemental jurisdiction statute as to constitute a special and important reason for review as set forth in Supreme Court Rule 10, no

writ of certiorari should be granted. It is clear from the present record that no such abuse of discretion has occurred. When federal claims are disposed of, it is appropriate for pendent state law claims to be dismissed as well. *Irish Lesbian and Gay Organization v. Bratton*, 882 F.Supp. 315 (S.D.N.Y. 1995), *aff'd*, 52 F.3d 311 (2d Cir. 1995); *Mark v. Borough of Hatboro*, 856 F.Supp. 966 (E.D.Pa. 1994), *aff'd*, 51 F.3d 1137 (3d Cir. 1994), *cert. denied*, 133 L.Ed.2d 107, 116 S.Ct. 165 (1995); *Wexley v. Michigan State*, 821 F.Supp. 479 (W.D.Mich. 1993), *aff'd*, 25 F.3d 1052 (6th Cir. 1994). Whether or not to exercise jurisdiction is left to the sound discretion of the District Court. *Gary v. Long*, 59 F.3d 1391 (D.C.Cir. 1995), *cert. denied*, 133 L.Ed.2d 493, 116 S.Ct. 569 (1995). The exercise of discretion over supplemental jurisdiction may be guided by principles which guided the exercise of discretion under pendent jurisdiction. *McCullough v. Branch Banking and Trust Co.*, 844 F.Supp. 258 (E.D.N.C. 1993), *aff'd*, 35 F.3d 127 (4th Cir. 1994), *cert. denied*, 130 L.Ed.2d 1069, 115 S.Ct. 1101 (1995). Where the federal case is dismissed at the Summary Judgment stage and there was no overriding interest of judicial economy or convenience, and no apparent unfairness in dismissal without prejudice of state claims, declining to exercise supplemental jurisdiction is appropriate. *Johnson v. Cullen*, 925 F.Supp. 244 (D.Del. 1996). Where civil rights claims are dismissed, the exercise of discretion to dismiss state law claims for wrongful termination is appropriate. *Franks v. Magnolia Hosp.*, 888 F.Supp. 1310 (N.D.Miss. 1995), *aff'd*, 77 F.3d 478 (4th Cir. 1996). Thus, the ruling in the present case does not demonstrate any substantial divergence from the types of

decisions prevalent in other circuits or in any way call for Supreme Court review.

II. PETITIONER WAS NOT DENIED FIFTH AMENDMENT DUE PROCESS AND SEVENTH AMENDMENT TRIAL BY JURY BY APPLICATION OF AN IMPROPER PROOF METHODOLOGY IN AN ALLEGED POLITICAL RETALIATION CASE

Plaintiff contends that the decision below did not apply the methodology of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973) and argues that this creates a conflict with the Eighth Circuit as reflected in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993). The record in the case *sub judice* does not present such a conflict or the circumstances for the resolution of such a conflict. Both cases cited by Plaintiff involved allegations of racial discrimination in employment practices. The proof methodology discussed in *McDonnell Douglas Corp.*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973) involves the Plaintiff carrying the initial burden of establishing a prima facie case. Once a prima facie case is demonstrated, the employer must meet the burden to articulate some legitimate, nondiscriminatory reason for the employee's rejection. *Id.* 411 U.S. at 802, 36 L.Ed.2d at 677-78. *St. Mary's Honor Center*, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993) explains that in cases where the proofs can establish a prima facie case for the Plaintiff, and where the Defendant meets its burden of producing nondiscriminatory reasons for its action, the further proceedings in the case leave the full burden of persuasion with the Plaintiff of proving discrimination and this obligation

is not limited to merely proving the pretextual nature of the employer's proffered reasons. *Id.*, 125 L.Ed.2d at 418-19. The form of proof methodology requirements in the First Amendment context is noted in *Mt. Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 50 L.Ed.2d 471, 484, 97 S.Ct. 568 (1977). Plaintiff has the burden to show the conduct was constitutionally protected and that the conduct was a substantial and motivating factor in the employment decision. If this burden is met, the Defendant has the burden to show that it would have reached the same decision in the absence of the protected conduct. The Third Circuit does not reject this approach to proof methodology, but has followed and accepted it. *Robertson v. Fiore*, 62 F.3d 596, 599 (3d Cir. 1995); *Rainero v. Antus*, 943 F.Supp. 413 (D.N.J. 1996). The case *sub judice* does not present an inter circuit conflict with the Eighth Circuit. The proof methodology discussed does not nullify the Summary Judgment procedure. Summary Judgment is appropriate where the competent and admissible evidence cannot support a rational fact finder reaching a verdict for the Plaintiff. The District Court opinion held that plaintiff's proofs did not support his claim that he was fired because of his political association and consisted of no more than conclusionary allegations that he spoke to two individuals. The District Court also noted that the evidence established that the employment decision was motivated by nothing more than a legitimately perceived need to reduce the school budget. (Petitioner's Appendix 30a, 31a). The record in this regard has been noted *supra*. This case involves nothing more than a political discrimination in employment claim that could not be supported by the

record when applying the Summary Judgment standard. See, e.g., *Robertson*, 62 F.3d 596, 599 (3rd Cir. 1995); *Rainero*, 943 F.Supp. 413 (D.N.J. 1996). It does not represent a misapplication of the applicable proof methodology and presents no reason for certiorari.

III. PETITIONER WAS NOT DENIED FIFTH AMENDMENT DUE PROCESS BY APPLICATION OF A POLITICAL VOTE PRIVILEGE AGAINST DEPOSITION QUESTIONS OF A NON PARTY WITNESS INQUIRY ABOUT HER VOTE IN A SCHOOL BOARD ELECTION AND OTHER VOTING

The decision applying a political vote privilege is published at *D'Aurizio v. Borough of Palisades Park*, 899 F.Supp. 1352 (D.N.J. 1995). Susan Spohn was a Council member, was deposed, but is not a Defendant in this case. At her deposition she was asked if she voted for certain persons in the April, 1992 School Board election and whether she voted anything other than Republican in the last five years. She refused to answer the questions and privileges was asserted. The issue was presented to the court below in an effort to compel answers and the court upheld the application of privilege. Plaintiff contends this was an advisory opinion and challenges the application of a political vote privilege. It is unclear how this discovery ruling could serve to change the result in the Summary Judgment rulings below.

Since there was a witness who declined to answer certain questions regarding voting for persons for public office and since Plaintiff wished to press for the answers, there clearly was an issue and case and controversy

before the court. Certainly, the witness had a right to have her voting right privilege protected if such a right applied. A controversy in the constitutional sense is one appropriate for judicial determination, definite and concrete, touching the legal relations of parties having adverse legal interests, admitting of specific relief and a definitive determination of legal rights in an adversary proceeding. *Aetna Life Insurance Co. of Hartford, Conn. v. Haworth,* 300 U.S. 227, 240-41, 81 L.Ed. 617, 621-22, 57 S.Ct. 667 (1936). Plaintiff's claim that the decision below on the privilege issue was advisory is without merit.

F.R.E. 501 provides that privileges of a witness are governed by the common law of the United States Courts. Since this matter was a civil rights action the court below applied federal common law principles. The court cited voluminous authority for the privilege in various jurisdictions and the Supreme Court recognized its existence in proposed Evidence Rule 507. The point was also made that the political vote privilege was a logical corollary of the secret ballot; the secret ballot being central to concepts of democracy and ordered liberty. Thus, the court ruled that the principles of the common law interpreted in light of reason and experience compel the recognition of the privilege to protect from compulsory disclosure the tenor of a person's vote at a political election conducted by secret ballot unless the vote was cast illegally. Plaintiff's Petition does not present a sound basis to challenge this reasoning. His argument that particularized harm had to be shown by the witness, such as fear of political retaliation, is not convincing because the loss of the secret ballot is lost by disclosure and that is the uniform harm that is to be prevented by the privilege. No voter need

show more. If the secret ballot has value, then so does this privilege. Plaintiff's argument that a school board election is not the exercise of a political vote is specious. Such an election in New Jersey determines the election of officials who decide the school budget, the largest component of public funds raised by the property tax. These officials also determine the policies followed by the local schools, within parameters determined by law, and the hiring of administrative and teaching personnel. All of these issues, while the elections do not have party labels, certainly involve the politics of taxation and public spending at the very least. The contention that such elections are not worthy of a political vote privilege should be rejected. Accordingly, this issue does not provide a basis for granting certiorari.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be denied in this matter.

Respectfully submitted,

SHARON HANDROCK MOORE
(Counsel of Record)
GEBHARDT & KIEFER, P.C.
JOSEPH J. ROTOLO, Esq.
Attorneys for Respondents,
Borough of Palisades Park,
William Maresco and
Paul Albanese

No. 98-57

RECEIVED
AUG 7 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1997

ALBERT D'AURIZIO,

Petitioner,

v.

BOROUGH OF PALISADES PARK, BOARD OF EDUCATION OF PALISADES PARK, WILLIAM MARESCA, individually and as Mayor of Palisades Park, PAUL ALBANESE, individually and as a member of the Borough Counsel, MICHAEL DeBARTOLO, individually and as a member of the Board of Education, VIRGINIA DeBARTOLO, individually and as a Borough official, MARY BETH COTTRELL, individually and as a member of the Board of Education, ROBERT CARNEY, individually and as a member of the Board of Education, CAROL KILLION, individually and as a member of the Board of Education, FRANCIS VALENZUELA, individually and as a member of the Board of Education, DAVID EICHENHOLTZ, individually and as an officer of the Board of Education, THOMAS TUSCANO, individually and as a member of the Palisades Park Republican Club, SUSAN GIACOBONE, individually and as an executive member of the Palisades Park Republican Party, CARMINE VERDICCHIO, individually and as Lead Custodian of the Board of Education, JAMES NICHOLS, individually and as an officer of the Board of Education, MATTHEW NICHOLS, individually and as a member of the Board of Education, GEORGE FASCIANO, individually and as Superintendent of Board of Education, PETER MAROSE, individually and as a member of Board of Education, and SMITH, DON, ALAMPI & D'ARGENIO, individually and as counsel for the Board of Education,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN METHFESSEL, JR.
Counsel of Record
METHFESSEL & WERBEL, ESQS.
1308 Pierce Street
P.O. Box B
Rahway, NJ 07065
732-382-4200

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

Attorney for Respondents:

Board of Education of Palisades Park; Michael DeBartolo, as a member of the Board of Education only; Mary Beth Cottrell, as a member of the Board of Education only; Robert Carney, as a member of the Board of Education only; Carol Killion, as a member of the Board of Education only; Francis Valenzuela, as a member of the Board of Education only; David Eichenhotz, as an officer of the Board of Education only; Carmine Verdicchio, as lead custodian of the Board of Education only; James Nichols, as an officer of the Board of Education only; Matthew Nichols, as a member of the Board of Education only; George Fasciano, as Superintendent of Board of Education only; and Peter Marose, as a member of the Board of Education only

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATUTES iii

INDEX TO APPENDIX iv

COUNTERSTATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

LEGAL ARGUMENT 7

POINT I 7

THE COURT PROPERLY GRANTED SUMMARY JUDGMENT 7

A. The Court Properly Found Plaintiff Was Terminated For Budgeting Reasons 7

B. The Failure To Place Plaintiff's Name On The Part-Time Custodial List Did Not Constitute A Violation Of His Civil Rights ... 14

POINT II 18

THE DISTRICT COURT PROPERLY DEFERRED TO THE MAGISTRATE'S FINDING THAT A POLITICAL VOTE PRIVILEGE DOES EXIST FOR SCHOOL BOARD ELECTIONS 18

POINT III 20

SINCE PLAINTIFF'S FEDERAL CLAIMS WERE DISMISSED, THE DISTRICT COURT PROPERLY DENIED PLAINTIFF'S STATE LAW CLAIMS UNDER THE PENDENT JURISDICTION DOCTRINE 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Bishop v. Wood, 426 U.S. 341 (1976) 15

Bd. of Regents of State Colleges v. Roth, 408 U.S. 560 (1968) 15

Borough of West Miflin v. Lancaster, 45 F.3d 780 (3d Cir. 1995) 22

Cleveland Bd. of Ed. v. Laudermill, 470 U.S. 532 (1985) 15

Foster v. Township of Hillside, 780 F. Supp. 1026 (D.N.J. 1992) 9

Growth Horizons, Inc. v. Delaware County, Pa., 983 F.2d 1277 (3rd Cir. 1993) 21

In re Grand Jury Investigation (appeal of United States), 918 F.2d 374 (3d Cir. 1990) 20

Johnson v. Cullen, 925 F. Supp. 244 (D. Del. 1996) 22

Laskaris v. Thornburgh, 733 F.2d 260 (3rd Cir. 1984), *cert. den.*, 469 U.S. 886 (1984) 9

Mt. Healthy v. Doyle, 429 U.S. 274 (1977) 9

Perez v. Cucci, 725 F. Supp. 209 (D.N.J. 1989) .. 8, 10, 11

Redlich v. Albany Law School of Union University, 899 F. Supp. 100 (N.D.N.Y. 1995) 22, 23

Shabat v. Blue Cross Blue Shield of the Rochester Area, 925 F. Supp. 977 (W.D.N.Y. 1996) 22

Smith v. Blackwell, 115 F.2d 186 (4th Cir. 1940) 19

St. Mary's Honor Center v. Hicks, 1135 S. Ct. 2742 (1993) 9

TABLE OF AUTHORITIES – Continued

Page

Stehney v. Perry, 907 F. Supp. 806 (D.N.J. 1995) 21

Timm v. Mead Corp., 32 F.3d 273 (7th Cir. 1994) 23

Trammel v. U.S., 445 U.S. 40 (1980) 20

Tully v. Mott Supermarkets, Inc., 540 F.2d 187 (3rd Cir. 1976) 21

University of Pennsylvania v. Equal Employment Opportunity Commission, 492 U.S. 182 (1990) 20

Wegbreit v. Marley Orchards Corp., 793 F. Supp. 957 (E.D. Washington 1991) 21

William T. Thompson Company v. General Nutrition Corp., 671 F.2d 100 (3rd Cir. 1982) 19, 20

STATUTES

2 U.S.C. Section 9 19

U.S.C.A. Section 1367 ..... 21, 22

N.J.S.A. 18A:17-3 15

N.J.S.A. 18A:17-4 16

N.J.S.A. 19:15-26 19

Fed.R.Evid. 501 ..... 19, 20

INDEX TO APENDIX

Defendant, Board of Education's letter to U.S. District Court dated August 29, 1996 with Rule 12G Statement Db1

COUNTERSTATEMENT OF THE CASE

This matter involves a discrimination action brought by the plaintiff, Albert D'Aurizio (hereinafter "Plaintiff"), against numerous defendants of diverse affiliations. Specifically, the plaintiff's First Amended Complaint sought relief from all defendants for (1) conspiring to violate the United States Constitution in violation of his First Amendment rights to freedom of association, freedom of speech, freedom to vote, equal protection under the Fourteenth Amendment, procedural due process and substantive due process; (2) violating the United States Constitution in violation of his First Amendment rights of freedom of association, freedom of speech, freedom to vote, equal protection under the Fourteenth Amendment, procedural due process and substantive due process; (3) conspiring to violate 42 U.S.C. Sections 1983 and 1985; (4) violating 42 U.S.C. Sections 1983, 1985 and 1986; (5) violating N.J.S.A. 10:5-1 *et seq.* (Law Against Discrimination); and (6) tortious interference.

Despite the broad allegations by Plaintiff as to a unified conspiracy by the Palisade Park Republicans, there are two distinct events which form the basis for plaintiff's complaints against the Board of Education. The first is whether or not there was any impropriety when the defendant Board eliminated plaintiff's custodial position in June of 1992. The second event is whether or not the defendant Board committed a legally cognizable impropriety when it failed to place plaintiff's name on a part-time custodial list created in or about December 1992.

Because these two events involve different players and different facts, as well as different legal analysis, in the interest of clarity and simplicity they were separately analyzed in the Board's summary judgment motion and by Judge Greenaway in his decision. The very fact that these two Board decisions involved separate players belies plaintiff's allegations that all of the defendants participated in one continuing conspiracy to violate his rights.

The plaintiff was hired by the Board as a custodian in June of 1991 on a part-time basis. Thereafter, in September 1991, he became a full-time employee at a salary of $26,000. At that time, he also had membership in Local 97. In November 1991, the plaintiff ran unsuccessfully for town councilman as an independent, being defeated by Republican party candidates.

In or about January/February 1992, the Board began its annual budget process for the 1992/1993 school year. That process includes the submission of a preliminary budget to the County of Bergen's Superintendent of Schools for approval to advertise the budget in advance of the public hearing as required by the County. At the budget hearing, the issues of increases and decreases are heard and the preliminary budget may be altered. What comes out of the public hearing is a proposed final budget which is then placed on the ballot to be voted on by the people. The 1992/1993 school budget was subsequently defeated by the voters in April 1992.

The specific line item for custodians is Account 610. In the initial budget, line 610 was $505,163. At a public hearing on March 17, 1992, budget cuts were made and

the voters were presented with a line item 610 as $498,163. Following the defeat of the budget, in accordance with standard procedure, the budget was submitted to the Mayor and Council for proposed cuts in the form of a Resolution. The Resolution can either be accepted or rejected by the Board. If accepted by the Board, the cuts would be adopted and implemented. If rejected, the Board must take an appeal. Generally, if the Board could effect the total amount of the proposed cuts in the Resolution without any problem, an appeal would not be taken.

In this case, the Resolution handed down by the Mayor and Council was accepted by the Board and adopted on motion at a regular meeting held June 9, 1992. Among the items adopted by the Board in accordance with the Mayor and Council's Resolution were the elimination of the position of Director of Maintenance, one custodian position and two maintenance positions. The custodian position was eliminated by seniority with the plaintiff's position being the first to be eliminated since he was the most recent hire. Because of an appeal by the maintenance worker, it was later determined that the maintenance workers could "bump" custodians. Thus, three custodians were ultimately laid off.

Another budget document was prepared and was submitted to the County. The County executed that document on June 2, 1992, prior to the alleged June 7th conspiracy meeting reflecting the cuts. Line item 610 was now $335,163. Although not officially adopted until June 9th, the revised budget, with the cuts, were "of record" by May of 1992 and approved by the County on June 2nd,

and thus known before the alleged June 7, 1992 conspiracy meeting. Put another way, there is no way this June 7th meeting was held for the sole purpose of "getting Al" as plaintiff set out to prove. The budget decisions were already made. Plaintiff, unfortunately, was low man on the totem pole and it was known that he was going to be affected by the budget cut.

By way of history, between 1984 and 1995, the budget was passed on only three occasions. For the years 1989-1990, 1990-1991, and 1991-1992, an appeal was taken twice. The Board did not want to go through the cost and litigation associated with another appeal for 1992-1993.

Plaintiff alleged that during the budget process, meetings took place among certain board members amounting to a conspiracy against him. The alleged "hit list" of Ms. Sherwood was nothing more than a budget worksheet. Other names are also contained on it and because of seniority, it was always known that any cuts were going to affect the plaintiff. It is to be further noted that the School Board candidates for April 1992 – Carney, DeBartolo, and Nicholas – openly campaigned on the principle that budget cuts needed to be made and custodial positions eliminated. That these defendants would favor custodial cuts was no secret and was in fact endorsed by the voters when they elected them to the School Board.

A meeting was held on June 7, 1992, at the offices of Rotolo and Rotolo, the Board's counsel. In addition to the defendants who were present at the alleged April meeting, the defendants Albanese, Virginia DeBartolo, Tuscano and Giacobone were present. Plaintiff contended

that the meeting was convened for the specific purpose of eliminating his custodial position.

During this same time period, a vacancy arose on the Board due to a member's resignation. That vacancy was filled by the defendant Valenzuela when he was voted in by the Board on June 9, 1992, at the Board's regular meeting. Immediately after becoming a Board member, the defendant Valenzuela, along with the other Board members, voted to eliminate the Director of Maintenance and two custodial positions pursuant to the Mayor and Council's resolution.

Finally, in or about December 1992, the Board determined the need for the implementation of a part-time custodial list whereby individuals would be called to work on an as-needed basis. Employing a part-time list meant that benefits did not have to be paid and that the number of work hours would be limited to 19 and 1/2. The advice of counsel was sought in connection with preparing this list and a legal opinion was rendered by the Board's counsel regarding the reemployment of laid-off employees.

SUMMARY OF ARGUMENT

The Court below properly found that plaintiff's termination in June of 1992 was due to budgetary constraints and that the Board acted in a justified, legitimate and nondiscriminatory manner. This was based on extensive evidence showing the budgetary problems.

The Board subsequently, in December 1992, hired individuals on an as-needed basis, and created a part-time employment list. Although plaintiff was entitled to be placed on a preferred eligibility list, the failure to place him on a part-time custodial list was not a violation of his civil rights.

The District Court properly deferred to the Magistrate's finding of a political vote privilege with regard to school board elections. The Magistrate was well within his discretion to expand the rules of privilege via analysis of common law precedent, legislative history and constitutional implications.

As the facts and legal analysis of the federal law claims is the same for the state LAD claims, once summary judgment was granted as per the federal law claims the state claims were properly dismissed. As per the pendent jurisdiction doctrine or supplemental jurisdiction, the District Court was entitled not to entertain plaintiff's state law claims once the federal law claims were dismissed.

The Courts below properly exercised their discretion in handling discovery and in not entertaining plaintiff's attempts to file dispositive discovery motions to strike defendants' pleadings.

LEGAL ARGUMENT

POINT I

THE COURT PROPERLY GRANTED SUMMARY JUDGMENT

A. The Court Properly Found Plaintiff Was Terminated For Budgeting Reasons

This case was best summarized by Judge Greenaway in his decision:

> In this case, D'Aurizio contends that he was fired from his custodian position because of his political association. However, D'Aurizio's evidence amounts to no more than conclusory allegations that he spoke to two individuals, one of whom is his sister-in-law, who told him the defendants secretly met and conspired to eliminate his custodian position with the Board. By contrast, the Board defendants provide the Court with ample documentary and testimonial evidence demonstrating that their implementation of the Borough's April 27 Resolution (which eliminated D'Aurizio's job), as well as the Board's prior cuts to the budget, were motivated by nothing more than a legitimately perceived need to reduce the school budget. Indeed, the Resolution reflected an overall reduction to the 1992-1993 school budget of $579,000.

As a preliminary matter, Plaintiff has raised some procedural objections to what occurred. He claims a violation of then Local Rule 12G. Plaintiff's Brief, page 17. This is not accurate because while a 12G statement was not originally provided, it was given to the Court before the motions were fully submitted. Db1-9. (References to

"Db" are to the appellee's appendix.) Plaintiff failed to provide these reply papers in his Appendix. It was certainly within the discretion of the Court deciding this motion to move past this procedural situation and deal with the substance of the case. Plaintiff also argues that no exhibits were properly before the Court and therefore there was no competent evidence on which to base a decision. *op. cit.* As Judge Greenaway's opinion reflects, he had overwhelming competent evidence at his disposal. Plaintiff's appendix contains the evidence supplied to the Court with our motion papers. The argument that because these exhibits were supplied with a brief they somehow disappear from the case is specious. The exhibits are documents and deposition testimony, all proper submissions on a summary judgment motion. The motion papers, like an attorney's certification, may not be, in and of themselves, evidentiary. However, they can serve as a proper vehicle to place admissible evidence before the court.

Judge Greenaway's decision, outlined the applicable law. For plaintiff to prove a violation of his First Amendment rights to run as an independent candidate, which is really the crux of his case, he must prove he, as a public employee, was engaged in protected conduct such as maintaining an affiliation with a particular party; and that his political affiliation was a substantial motivating factor in the personnel decision. Furthermore, there is no First Amendment violation if the action taken by the defendants would have been taken even in the absence of the protected activity. *Perez v. Cucci*, 725 F. Supp. 209 (D.N.J. 1989), *aff'd*, 898 F.2d 139 (3d Cir. 1990). Plaintiff must show that his political affiliation was a substantial

or a motivating factor in his discharge. *Laskaris v. Thornburgh*, 733 F.2d 260 (3rd Cir. 1984), *cert. den.*, 469 U.S. 886 (1984). If the plaintiff shows his political association is a substantial or motivating factor in the adverse employment decision, the burden shifts to the employer to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. *Mt. Healthy City School Board of Education v. Doyle*, 429 U.S. 274 (1977).

For purposes of this case, the defendant Board had two ways to prevail. First, by showing that the plaintiff has failed to establish a *prima facie* case. *Foster v. Township of Hillside*, 780 F.Supp. 1026, 1042 (D.N.J. 1992). If the Court found the plaintiff had established a *prima facie* case, the defendant Board could still prevail by: (1) offering legitimate, nondiscriminatory reasons for the action; and, (2) showing that the plaintiff could not raise a genuine issue of material fact regarding whether defendants' proffered explanation was pretextual. *Id.* In *St. Mary's Honor Center v. Hicks*, 1135 S.Ct. 2742, 2752 (1993), the United States Supreme Court ruled definitively that a finding that an employer had articulated a pretextual reason for a defendant's actions does not mandate judgment for the plaintiff. Instead, a reason cannot be proved to be a pretext for discrimination unless it is shown both that: (1) the reason was false; and, (2) that discrimination was the real reason. *Id.*

Applying these principles to the facts of this case, Judge Greenaway properly found that the budgetary problems were not a pretext but were shown by ample documentary and testimonial evidence countered by

insufficient allegations by plaintiff. The plaintiff – a public employee – alleges he exercised his right to maintain a political affiliation by running for Town Council on the independent ticket and was entitled to do so without fear of retaliation. For the sake of argument, the plaintiff might meet prongs one and two of the *Perez* test. However, the facts clearly show that plaintiff's political affiliation was not a substantial motivating factor in the decision to eliminate his custodial position. To the contrary, the facts support the defendant Board's position that the plaintiff's job would have been eliminated even if he had not run for Council in November 1991.

The legitimate, nondiscriminatory reason for eliminating plaintiff's custodial position, together with the Director of Maintenance position and other custodial positions, was to implement budget cuts proposed by the Mayor and Council by way of Resolution following the budget's defeat by the voters. The precipitating need for the budget cut was the exercise by the voters of Palisades Park of their Constitutional right to vote on a proposed budget and reject same if they felt it was too high. Various members of the Board, including former member Linda Sherwood, testified that noneducational items were favored to be cut over education items such as a teacher's salary or the like. In this case, it was that very choice that caused plaintiff's job to be sacrificed.

Thus, the plaintiff's unsuccessful bid for Town Council had nothing to do with his custodial position being eliminated. Rather, it was the necessity of cutting the budget and the Board's goal of cutting noneducational expenses first that ultimately resulted in job elimination. In other words, plaintiff – the custodian with the least

seniority – does not have a Constitutional right to a position subsidized by the taxpayers of Palisades Park when the populace expressly voted to cut the school budget. Plaintiff, in his arguments about conspiracies and "hit lists", fails to address that a school budget is paid for by public funds and it is the voters who also have a say in how their tax dollars are allocated.

As early as February 1992, there was a proposed budget cut in the custodian line item. As plaintiff's sister-in-law, Board President Carol Killion testified, as early as February 1992, it was evident that the plaintiff might lose his job because of his low seniority status and the need to bring the budget in for as low as possible. This was prior to the budget being submitted to the people, prior to the alleged conspiracy meetings said to have taken place in April and June of 1992, and prior to the defendant Valenzuela being voted on the Board. In fact, when the budget was submitted to the voters, the plaintiff's salary slot had already been eliminated. That had been based on budget discussions ongoing since December of 1991.

Unlike the standard operating procedure followed by Jersey City in the *Perez* case, above, the record is devoid of any evidence suggesting that the Town of Palisades Park practiced post-election personnel changes. In fact, this is not a case where a new administration "cleans house" and then appoints politically-aligned individuals to fulfill campaign promises. Economic necessity mandated drastic cuts to make an acceptable budget. In order to do that, it was necessary to cut noneducational line items including custodial salaries.

Furthermore, the removal of the plaintiff's job was in line with the stated objective of the defendants Michael DeBartolo, Carney and Nicholas when they ran for the Board in March 1992 prior to any alleged conspiracy meeting and prior to the defendant Valenzuela's appointment to the Board. Part of their platform consisted of eliminating nonessential positions within the school system. Thus, from the outset, prior to any "secret" meetings being held and prior to defendant Valenzuela's appointment, certain defendant Board members had already openly established their goals if elected. The fact that these three candidates were elected indicates that the voters approved of their platform. The voters chose to limit their property taxes at plaintiff's expense. This does not make the plaintiff the victim of a conspiracy. Rather, plaintiff's job was the victim of a taxpayers' revolt. Plaintiff's actual complaint should be directed at each resident of Palisades Park who voted against the budget since they ultimately mandated that plaintiff's position be eliminated.

Additionally, the fact that the defendant Valenzuela was appointed to the Board and then voted in favor of eliminating plaintiff's job is an allegation without substance. First, since it was apparent that plaintiff's job might be eliminated as early as February 1992 and it was a certainty once the budget was voted down and the Mayor and Council mandated cuts, there was no need for the Board to recruit the defendant Valenzuela in the alleged conspiracy as plaintiff suggests. Second, even if the defendant Valenzuela abstained from voting on plaintiff's termination, the motion would still have passed since only two members voted "nay" and one abstained.

There still would have been enough affirmative votes to pass the motion without Valenzuela.

Finally, in support of the defendant Board's position is the fact that the Mayor and Council's resolution, which included the elimination of plaintiff's job and the necessary changes to the budget, were forwarded to the Board of Education, to the County Superintendent of Schools, to the New Jersey Department of Education and to the Chief Financial Officer of the Borough of Palisades Park in addition to being posted on the bulletin board in Borough Hall before any alleged conspiracy meeting of June 7, 1992. The elimination of plaintiff's job became public knowledge in May 1992. The defendants hardly needed to have a "secret" conspiracy meeting in June to implement a plan of action mandated by the voters in the April election, required by the Mayor and Council resolution after the election, and reported to various public entities, including the Bergen County Superintendent of Schools, by the end of May.

While plaintiff, for the sake of argument, may have met his initial burden, the above facts sufficiently demonstrate that the defendant Board met its burden of showing that the elimination of plaintiff's position was due to budgetary constraints and that the defendant Board was more than justified in taking such action. Therefore, the defendant Board legitimately and nondiscriminatorily eliminated plaintiff's position and, as such, did not violate his First Amendment and/or his civil rights in doing same, and Judge Greenaway's decision on this point should be affirmed.

B. The Failure To Place Plaintiff's Name On The Part-Time Custodial List Did Not Constitute A Violation Of His Civil Rights

Plaintiff also contended that following the elimination of his custodial position, the defendant Board discriminated against him by failing to place his name on the part-time custodial list created in December 1992. He alleged that the omission of his name from the custodial roster was a deliberate act of retaliation arising out of the November 1991 election. A close review of the facts, however, demonstrated that the plaintiff's claim is without merit.

The part-time custodial list was created in December 1992, approximately six months after the plaintiff's position was eliminated by the Board due to budget constraints. It was determined that additional custodial help was needed, but the Board did not want full-time employees. The utilization of part-time personnel behooved the school district financially because, among other things, benefits did not have to be paid and the number of work hours was limited to 19 and 1/2. Full-time employees, on the other hand, received benefits and could work an unlimited number of overtime hours. Additionally, the part-time custodians would only be called on an as-needed basis, generally in emergent situations or if unexpected problems arose. The fact that the defendant Board ultimately expended more money on the part-time employees is of no consequence. Clearly, the defendant Board had no way of knowing the cost to them when the part-time list was first implemented. In fact, the list was created with continued cost-cutting as the objective. What they had not counted on were the unforeseen

circumstances that arose the following winter which required an exorbitant amount of help.

Unlike the First Amendment argument raised in Point I(A) above, the plaintiff is unable to make even a semblance of a showing that he has been deprived of a Constitutionally-protected right or property interest. Initially, for plaintiff to sustain his cause of action, it must be determined that a liberty or property interest exists entitling him to due process protection. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 560, 569. Property interests are not created by the Constitution but rather are created and defined "by existing rules or understandings which stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents*, 408 U. S. at 577. A property interest in continuing public employment can be created either by statute or contract where the public employer is barred from terminating or not renewing the employment relationship without cause. *See Cleveland Bd. of Ed. v. Laudermill*, 470 U.S. 532 (1985); *Bishop v. Wood*, 426 U.S. 341 (1976).

N.J.S.A. 18A:17-3 states:

> Every public school janitor . . . shall, unless he is appointed for a fixed term, hold his . . . employment under tenure during good behavior . . . and shall not be dismissed . . . , *except as the result of the reduction of number of janitors* . . . except for neglect, misbehavior or other offense. . . .

(emphasis added).

Furthermore, *N.J.S.A.* 18A:17-4 states:

> No Board of Education shall reduce the number of janitors . . . by reason of . . . political affiliation and when any janitor . . . is dismissed by reason of reduction in the number of such employees the one having the least number of years to his credit shall be dismissed in preference . . . and the person so dismissed shall be and remain a part of a preferred eligibility list, in the order of years of service for reemployment whenever vacancies occur. . . .

In reviewing the above statute, it is clear that the defendant Board complied with all of its requirements. First, the plaintiff's position was eliminated due to a reduction in the number of janitors. Second, the plaintiff specifically was dismissed pursuant to a seniority system. Additionally, although the statute requires dismissed janitors to be placed on a preferred eligibility list, a plain reading of the statute cannot be interpreted to require placement of a dismissed janitor upon a part-time custodial list. No full-time janitors were hired in plaintiff's stead and, within two years, all custodial positions were eliminated and the work was given to outside contractors.

Specifically, the placement of a dismissed janitor on a preferred eligibility list concerns the reemployment of that janitor in the event a vacancy occurs. In this instance, there was no reemployment but, rather, individuals called in on an as-needed, temporary basis. Furthermore, individuals were not called in because of a vacancy but because of necessity.

Moreover, the exclusion of plaintiff's name from the part-time list was not a hasty and arbitrary act of the

defendant Board. To the contrary, the Board sought the advice of its counsel when confronted with the reemployment rights of laid off custodians. The Board's counsel, in a legal memo, opined that the defendant Board had no statutory obligation to include plaintiff on the list. In fact, the Board's counsel recognized that Article V(B)(6) of the collective bargaining agreement with Teamsters Local 97, of which plaintiff was member, the Board retained the right to contract for such needed services as it determines. Consequently, the defendant Board, in reasonable reliance upon the advice of counsel, was confident that plaintiff's exclusion from the list did not in any way violate his rights.

In conclusion, there is no nexus between the November 1991 election and the failure to place plaintiff's name on the part-time list and, therefore, no First Amendment violation. Additionally, there is no entitlement to the placement of plaintiff's name on the part-time list, only an entitlement to be placed on a preferred eligibility list, which list is clearly distinguishable from the part-time list. The defendant Board reasonably relied upon the advice of counsel when considering the reemployment rights of laid off employees and acted accordingly. Finally, plaintiff has failed to show that the failure to place his name on the part-time list is causally connected to a Constitutionally-protected reason. Once again it is respectfully requested that this Honorable Court affirm Judge Greenaway on this point.

POINT II

THE DISTRICT COURT PROPERLY DEFERRED TO THE MAGISTRATE'S FINDING THAT A POLITICAL VOTE PRIVILEGE DOES EXIST FOR SCHOOL BOARD ELECTIONS

Plaintiff's counsel was seeking to invade the sanctity of the voting booth and force a witness to reveal, in public, for whom she secretly voted. Specifically, non-party witness Susan Spohn refused to answer plaintiff's deposition questions regarding her voting record in school elections as well as in general elections. The political vote privilege is specifically intended to avoid this situation in that it assures voter secrecy which insures both free and fair elections. Non-recognition of this would put at risk an essential element of American Democracy. Despite the public's "right to every man's evidence – the need to protect voter secrecy is sufficiently – and overwhelmingly – important to outweigh that principle." (cited by the Magistrate at 899 F. Supp. at 1360-61)

The fact that individuals are politicians does not mean that they are any less entitled to have the secrecy of their votes protected. By being a politician, a person does not waive his rights and privileges as a private citizen when acting as a private citizen. Furthermore, politicians need the secrecy of the vote more than any other person. Politicians would be the ones most subject to political retaliation, by members of their own party, if they did not, in the secrecy of the voting booth, vote for their own party. The whole purpose of the secret ballot is so that people can vote their conscience. This right would be severely violated if plaintiff's arguments are accepted.

In *William T. Thompson Company v. General Nutrition Corp.*, 671 F.2d 100, 103-104 (3rd Cir. 1982) (cited by the Magistrate at 899 F. Supp. 1353-54) in Federal question cases, the Federal Common Law privileges apply. Where there are Federal claims in the case also presenting State Law claims, the Federal Rule favoring admissibility, rather than any State Law privilege, controls. However, this holding does not preclude resort to State Law analogies for the development of the Federal Common Law of privileges in instances where the Federal Rule is unsettled. Contrary to plaintiff's argument, the Federal Law is not settled on this issue. Furthermore, resort to the State Law was completely appropriate. There are no Federal statutes on Federal elections because they appear to defer to applicable State Law. For example, the procedure for Congressional elections is set forth in 2 U.S.C. § 9. This specifically grants to the States the right to control voting procedures. The Fourth Circuit held in *Smith v. Blackwell*, 115 F.2d 186 (4th Cir. 1940), that Federal elections would be a matter of State Law. State Law in New Jersey makes votes secret and, further, makes it a misdemeanor to violate the secrecy provisions. N.J.S.A. 19:15-26. As Federal elections defer to State Law in how they are conducted, it is appropriate for the Federal Common Law concerning privileges arising out of these very same elections to also defer to State Law.

The District Court reviewed the Magistrate's analysis and reasoning behind his decision to find Ms. Spohn had a political vote privilege and therefore she did not have to answer plaintiff's questions relating to her voting record in certain elections. The District Court determined that the Magistrate analyzed Rule 501 of the Federal

Rules of Evidence and reference to Third Circuit precedent; namely, *Thompson, supra*. The District Court noted that federal courts are wary to expand or treat liberally the concept of common law privilege. But on a case-by-case basis, the courts have flexibility to develop rules of privilege as are necessary. *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182 (1990); *Trammel v. U.S.*, 445 U.S. 40 (1980); *In re Grand Jury Investigation (appeal of United States)*, 918 F.2d 374, 378-79 (3d Cir. 1990). And, it was determined that the Magistrate analyzed Rule 501 and properly considered the existence of a privilege in this case; that the Magistrate did not adopt the New Jersey Rules of privilege in making this decision; and that the Magistrate analyzed the asserted privilege in light of relevant common law precedent, legislative history and constitutional implications. (See Letter opinion dated May 15, 1996.) Taking all of this analysis into account, the Magistrate came to a conclusion "in light of reason and experience." *Fed.R.Evid.* 501. Thus, the decision of the District Court to defer to the Magistrate's finding of a political vote privilege was proper.

POINT III

SINCE PLAINTIFF'S FEDERAL CLAIMS WERE DISMISSED, THE DISTRICT COURT PROPERLY DENIED PLAINTIFF'S STATE LAW CLAIMS UNDER THE PENDENT JURISDICTION DOCTRINE

The District Court decided not to retain jurisdiction of plaintiff's state law claims under the pendent jurisdiction doctrine. The pendent jurisdiction doctrine has not

become bad law, but was modified to confer supplemental jurisdiction on the courts. Whether under the original "pendent jurisdiction doctrine" or the "supplemental jurisdiction doctrine" the district court had the discretion not to retain this matter for the resolution of state law claims.

As per U.S.C.A. Section 1367(c), "The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . (3) the district court has dismissed all claims over which it has original jurisdiction. . . . In exercising its discretion, the district court should take into account principles of judicial economy, convenience, and fairness to the litigants. *Stehney v. Perry*, 907 F. Supp. 806 (D.N.J. 1995) [citing *Growth Horizons, Inc. v. Delaware County, Pa.*, 983 F.2d 1277 (3d Cir. 1993)]. The decision to retain or decline jurisdiction requires a case specific analysis. Indeed, in amending the statute, Congress deemed the courts "may" decline to exercise supplemental jurisdiction over a claim if the district court has dismissed all claims over which it had original jurisdiction. Thus, broad discretion was provided in making such a determination. Although a district court could retain supplemental jurisdiction over state claims following dismissal of federal claims, the better practice is to dismiss the state claims. *Wegbreit v. Marley Orchards Corp.*, 793 F. Supp. 957 (E.D. Washington 1991).

In the instant matter, the district court dismissed the state law claims by citing to *Tully v. Mott Supermarkets, Inc.*, 540 F. 2d 187 (3d Cir. 1976). Specifically, the court stated it cannot exercise pendent jurisdiction in the absence of a federal claim to confer subject matter jurisdiction. Although pendent jurisdiction has been modified

to incorporate supplemental jurisdiction, the court is still provided with the option of declining retention of state law claims. See U.S.C.A. Section 1367(c).

Whereas numerous cases have illustrated the court's option to retain cases under this doctrine, numerous cases also illustrate the option not to exercise supplemental jurisdiction. In *Shabat v. Blue Cross Blue Shield of the Rochester Area*, 925 F. Supp. 977 (W.D.N.Y. 1996), the judge dismissed plaintiff's federal claims and stated "I decline to exercise jurisdiction over his claim under the New York Human Rights Law." That case further recognizes that "it is well settled that 'if the federal claims are dismissed before trial . . . the state claims should be dismissed as well.' "

In *Johnson v. Cullen*, 925 F. Supp. 244 (D. Del. 1996) the court dismissed all federal claims and stated, "Congress has granted the district courts discretion to decline to exercise jurisdiction over non-federal claims over which the court may have had supplemental jurisdiction under [U.S.C.A. 1367] section (a)." The court went on to note:

> Moreover, a federal court should avoid needless decisions of state law both as a matter of comity and to promote justice between the parties. If the federal claims are dismissed prior to trial, even though not insubstantial in a jurisdictional sense, the non-federal claims should be likewise dismissed.

(citing *Borough of West Miflin v. Lancaster*, 45 F.3d 780 (3d Cir. 1995) citing *United Mine Workers*, 383 U.S. at 726-27).

Also, in *Redlich v. Albany Law School of Union University*, 899 F. Supp. 100 (N.D.N.Y. 1995), the court dismissed all pending federal claims and deemed the only remaining issues involved alleged violations of state law. The court decided:

> The relevant exception to the exercise of supplemental jurisdiction in this case is that this court "has dismissed all claims over which it has original jurisdiction." Thus, since all federal claims have been dismissed, this court declines to exercise supplemental jurisdiction over the remaining state law claims, and dismisses those claims, without reaching the merits, for lack of subject matter jurisdiction.

Although plaintiff relies on *Timm v. Mead Corp.*, 32 F.3d 273 (7th Cir. 1994) for the principle that the district court has authority to retain jurisdiction over state law claims, it is also a well-settled principle that the district court has discretion to decline such jurisdiction. The court's discretionary approach includes judicial economy, convenience, fairness and comity. Thus, district court's determination whether or not to exercise jurisdiction, that decision, being discretionary, should not be disturbed. *Id.* at 277. In the instant matter, the court used its discretion and decided not to exercise supplemental jurisdiction as permitted by statute. Thus, this decision should not be disturbed.

CONCLUSION

Based upon the foregoing, it is respectfully requested that the Court decline to issue a Writ of Certiorari to the Court of Appeals for the Third Circuit in this matter and not reverse the dismissal below.

Respectfully submitted,

METHFESSEL & WERBEL, ESQS.

JOHN METHFESSEL, JR.
Attorney for Respondent, Board of Education and its members in their official capacity

On the Brief:

DONALD L. CROWLEY, ESQ.

Db 1

Law Offices
METHFESSEL & WERBEL

A Professional Corporation
1308 Pierce Street
P.O. Box B
Rahway, New Jersey 07065
908-382-4200
Telecopier 908-382-4437

[Names Omitted In Printing]

August 29, 1996

William T. Walsh, Clerk
United States District Court for
the District of New Jersey
Dr. Martin Luther King Courthouse
50 Walnut Street
Newark, NJ 07101

Re: D'AURIZIO, ALBERT v. BOROUGH OF PALISADES PARK
Our File No.: D 37404 DLC
Docket No. : 93-4417 (NHP)

Dear Mr. Walsh:

Kindly accept the following letter brief in lieu of a more formal brief in reply to the plaintiff's opposition to the defendant Board of Education's (hereinafter the "Board") motion for summary judgment which is returnable before the Honorable Nicholas Politan on September 23, 1996.

First, in response to the plaintiff's opposition, enclosed is the Board's Rule 12G Statement of Undisputed Facts which was inadvertently excluded from the moving papers. We apologize for any inconvenience this may have caused counsel and/or the Court and respectfully

request that the Board's motion *not* be denied on those grounds.

Second, although the plaintiff's opposition speaks to "all defendants'" dispositive motions, this reply will address only those arguments raised in opposition to the *Board's* summary judgment motion.

THE ELIMINATION OF PLAINTIFF'S POSITION

The plaintiff's opposition to the Board's motion for summary judgment is captioned, "Board's confusion with the budget." To the contrary, it is plaintiff's counsel who is confused with the budget process. Although the process is explained at length in the Board's moving papers, as well as in the moving papers of defendants Borough of Palisades Park, Albanese and Maresca, it appears necessary to clarify certain points.

Because the budget was defeated by the voters of Palisades Park, cuts in the budget were mandated. Even as early as February 1992, as evidenced by Exhibit B to the Board's moving brief, the plaintiff's job was in jeopardy. This was *prior* to the "trio" running for election, *prior* to the Mayor and Council's resolution, *prior* to any "conspiracy" meetings, and *prior* to the appointment of the defendant Valenzuela to the Board.

Contrary to the plaintiff's assertion, the worksheet prepared by Linda Sherwood was not a prefabricated "hit list" but, rather, was part and parcel of the extensive budget process. The plaintiff makes much ado about his name appearing in print on the worksheet. However, because of the seniority system, the plaintiff's job was to

be eliminated no matter how it was referenced in the worksheet. The plaintiff's name was not the only one to specifically appear on the worksheet. Other job cuts were referenced by name. (See Exhibit B to Board's moving brief).

With regard to the Mayor and Council's Resolution, the plaintiff argues that because of a surplus, the plaintiff's job did not have to be cut. Clearly, it is the plaintiff who is confused about the budget. The plaintiff misinterprets the purpose of the cuts which were *not* made because there was not enough money. They were necessitated by the defeat of the budget by the voters and were implemented to ease the taxpayers' burden and to overcome prior financial problems without jeopardizing the students' education. (See Exhibit D to the Board's moving brief).

The Resolution itself shows that an overall reduction in the budget of $579,000 was needed. (See Exhibit D to the Board's moving brief). The surplus plaintiff refers to was specifically allocated for unexpected circumstances. (See Exhibit D to the Board's moving brief). It was not intended to take up slack and pay for dispensable positions such as plaintiff's. In fact, as the Resolution shows, a $100,000 cut was made to the surplus allotment as well. (See Exhibit D to the Board's moving brief).

The plaintiff was not the only Borough employee to be laid off in June 1992. In addition to the custodial cuts, two secretarial positions were to be eliminated. (See Exhibit D to the Board's moving brief). More important, the cuts in account 610 (custodial and maintenance) were part of an

overall move to revamp the existing custodial and maintenance program, *not* a scheme to retaliate against the plaintiff for his bid for town council. (See Exhibit D to the Board's moving brief). In fact, the Board ultimately fulfilled that desire by hiring an outside custodial service to perform the function of the entire custodial/maintenance staff. Such outside service exists to this day.

In further support of the Board's position, the cutting of the custodial positions ($163,000) and the secretarial positions ($171,000) accounted for the two largest cuts proposed by the Mayor and Council in its Resolution. (See Exhibit D to the Board's moving brief.) The most drastic cuts, then, were made to noneducational items, exactly in line with the Board's objective to preserve education. (See Exhibit B to Board's moving brief).

Assuming, *arguendo,* that the plaintiff's bid for town council played a role in his layoff, no constitutional violation occurred since the cuts in noneducational items, including the elimination of jobs based on seniority, would have been made anyway since it was the Board's continuing objective. Logically, it was the voters' defeat of the budget that prompted plaintiff's termination, a vote which had absolutely nothing to do with the plaintiff's run for election.

Thus, for plaintiff to prevail, the Court must accept as true that the entire voting population, together with all defendants, conspired to retaliate against the plaintiff. Even if there were mixed motives for eliminating plaintiff's position, the Board is still entitled to summary judgment since it would have made the same decision had the plaintiff not participated in the 1991 election. *See Mt.*

Healthy City Schools District Bd. of Ed. v. Doyle, 429 U.S. 274 (1977).

THE FAILURE TO PLACE PLAINTIFF'S NAME ON THE PART-TIME LIST

Notwithstanding the above, the plaintiff argues that the failure of the Board to place plaintiff's name on the part-time list shows pretext. However, as set forth in the Board's moving papers, the Board did not fail to rehire plaintiff as required by the collective bargaining agreement or by the Board's own policy. To reiterate, *no* vacancies occurred following the plaintiff's termination. The part-time list was simply implemented to further reduce costs. (See Exhibit G to the Board's moving brief). The procedure permitted individuals to be called to work on an as-needed basis with limited hours of work and no benefits. (See Exhibit G to the Board's moving brief).

The failure to place the plaintiff's name on that list was not a random act. In fact, the Board sought the advice of its counsel which was memorialized in an opinion dated December 7, 1992, annexed to the Board's moving brief as Exhibit H. That issue is discussed at length in Point II of the Board's brief.

For clarification purposes, however, the Board did not advance the reliance argument to "pass the buck" as suggested by plaintiff, and does not contradict the argument raised by the Board's counsel in its papers. The argument was advanced to show that the defendant Board complied with all of the statutory requirements, that the Board did not violate the plaintiff's constitutional

rights, and that the Board did not perform a hasty or arbitrary act.

PROCEDURAL AND SUBSTANTIVE DUE PROCESS

Finally, as for the plaintiff's procedural and substantive due process arguments, the Board relies upon the arguments raised in its opposition to the plaintiff's motion for partial summary judgment previously served on all counsel and filed with the Court.

CONCLUSION

The above facts support the Board's position that the voters' rejection of the budget was the substantial and motivating factor in the elimination of plaintiff's position. As such, the Board has met its burden in providing a legitimate, nondiscriminatory reason for its actions. In contrast, the plaintiff has failed to raise a genuine issue of material fact that the Board's actions were a pretext to discrimination against the plaintiff.

Based on the arguments raised in the Board's moving brief, it is respectfully requested that summary judgment be granted in its entirety.

Respectfully submitted,

METHFESSEL & WERBEL, ESQS.

/S/ Donald L. Crowley
Donald L. Crowley
Ext. 123

DLC:db

Enc Rule 12G Statement in Support of Motion for Summary Judgment Certificate of Service

COUNSEL LIST

METHFESSEL & WERBEL, ESQ.
1308 Pierce Street
PO Box B
Rahway, New Jersey 07065
Attention: Donald L. Crowley, Esq.
Counsel for Defendant Board of Education
Borough of Palisades Park

cc: Michael S. Kimm, Esq.
The Corporate 505 Building
505 Main Street, 3rd Floor
Hackensack, NJ 07601
Attention: Michael S. Kimm, Esq.
Counsel for Plaintiff, Albert D'Aurizio

cc: Gebhardt & Kiefer
1318 Route 31, CN 4001
Clinton, NJ 08809-4001
Attention: Patricia S. Colabella, Esq.
Counsel for Defendant, Borough of Palisades Park

cc: Joseph J. Rotolo
50 Summit Avenue
Hackensack, NJ 07601
Counsel for Defendants, William Marasca and Paul Albanese

cc: Schepisi & McLaughlin, P.A.
473 Sylvan Avenue
PO Box 1313
Englewood Cliffs, NJ 07632-1313
Attention: Frank M. O'Shea, Esq.
Counsel for Defendant, David Eichenholtz

cc: Oury & Misdol
411 Hackensack Avenue
Hackensack, NJ 07601
Attention: Dennis J. Oury, Esq.
Counsel for Defendant, Thomas Toscano

cc: Sinisi, Van Dam, Sproviero & Sorolich
TWO Sears Drive - P.O. Box 1458
Paramus, NJ 07653
Attention: Scott G. Sproviero, Esq.
Counsel for Defendants, Carmine Verdicchio,
James Nichols

cc: Melli & Wright
West 115 Century Road
Paramus, NJ 07652
Attention: John P. Paxton, Esq.
Counsel for Defendant, Smith, Don, Alampi &
D'Argenio

cc: Sabbath, Stubel, Ragno,
Petrie, Oroho & Spinato
Riverdale One, Box 230
Riverdale, NJ 07457
Attention: John Oroho, Esq.
Counsel for Defendants, Michael De Bartolo,
Virginia De Bartolo,
Frances Valenzuela, and
Susan Giacobone

cc: Carol Killion, Pro Se
121 Grand Avenue
Palisades Park, New Jersey 07652

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

METHFESSEL & WERBEL, ESQS.
1308 Pierce Street – P.O. Box B
Rahway, NJ 07065
908-382-4200
Attorneys for Defendants:
Board of Education of Palisades Park; Michael DeBartolo, as a member of the Board of Education only; Mary Beth Cottrell, as a member of the Board of Education only; Robert Carney, as a member of the Board of Education only; Carol Killion, as a member of the Board of Education only; Francis Valenzuela, as a member of the Board of Education only; David Eichenholtz, as an officer of the Board of Education only; Carmine Verdicchio, as lead custodian of the Board of Education only; James Nichols, as an officer of the Board of Education only.

Our File No.: D-37404-DLC

ALBERT D'AURIZIO

Plaintiff(s)

VS.

BOROUGH OF PALISADES PARK, BOARD OF EDUCATION OF PALISADES PARK, WILLIAM MARESCA, individually and as Mayor of Palisades Park, PAUL ALBANESE, individually and as a member of the Borough Council, MICHAEL DeBARTOLO, individually and as a member of the Board of Education, VIRGINIA

Hon. Nicholas Politan

DOCKET NO.:
93-4417 (NHP)

CIVIL ACTION

DEFENDANT BOARD OF EDUCATION'S RULE 12G STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

DeBARTOLO individually and as a Borough official, MARY BETH COTTRELL, individually and as a member of the Board of Education, ROBERT CARNEY, individually and as a member of the Board of Education, FRANCIS VALENZUELA, individually and as a member of the Board of Education, DAVID EICHENHOLTZ, individually and as an officer of the Board of Education, THOMAS TUSCANO, individually and as a member of the Palesades Park Republican Club, SUSAN GIACOBONE, individually and as an executive member of the Palisades Park Republican Party, CARMINE VERDICCHIO, individually and as Lead Custodian of the Board of Education, and JAMES NICHOLS, individually and as an officer of the Board of Education

Defendants.

---

1. The 1992/1993 budget was defeated by the voters of Palisades Park in April 1992. (See **Exhibit D** to the Board's moving brief).

2. At a budget hearing held March 17, 1992, budget cuts were made. (See **Exhibit L** to the Board's moving brief).

3. Following the defeat of the budget, in accordance with the budget process, the budget was submitted to the

Mayor and Council for proposed cuts in the form of a Resolution. (See **Exhibit B** to the Board's moving brief).

4. The Board of Education accepted the Mayor and Council's Resolution and adopted same on motion at a regular meeting held June 9, 1992. (See **Exhibit D** to the Board's moving brief).

5. The Resolution of the Mayor and Council included the elimination of the Director of Maintenance position, one custodial position, and two maintenance positions. (See **Exhibit D** to the Board's moving brief).

6. The plaintiff, at the time of the cuts, was the most recent hire and was thus laid off. (See **Exhibit B,** P107 L17-18 of the Board's moving brief.)

7. On June 2, 1992, the County of Bergen executed a budget document reflecting cuts. (See **Exhibit M** to the Board's moving brief).

8. April 1992 School Board candidates, Carney, DeBartolo and Nicholas, campaigned on the principle that budget cuts needed to be made and custodial positions eliminated. (See **Exhibit I** to the Board's moving brief).

9. At the June 9, 1992, meeting, two members of the Board voted "nay" and one member abstained on the vote to eliminate the plaintiff's position. (See **Exhibit E** to the Board's moving brief).

10. In or about December 1992, the Board determined a need to implement a part-time custodial list. (See **Exhibit F,** P173 L5 to the Board's moving brief).

11. Individuals on the part-time list received no benefits, were called in an an as-needed basis and worked only 19 and 1/2 hours per week. (See **Exhibit B** P124 L6-10 and **Exhibit G,** P182 L16-25, P183 L1-2 of the Board's moving brief).

12. The Board's counsel rendered a legal opinion in the form of a memo dated December 7, 1992, regarding the re-employment of laid-off employees. (See **Exhibit H** to the Board's moving brief).

13. As early as February 1992, there was a proposed budget cut in the custodian line item. (See **Exhibit B,** P523 L17-211.

14. The plaintiff's salary slot was eliminated when the budget was submitted to the voters. (See **Exhibit B,** P676 L7-17 to the Board's moving brief.)

15. The Mayor and Council's Resolution was submitted to the Board of Education, the County Superintendent of Schools, the New Jersey Department of Education and the Chief Financial Officer of the Borough of Palisades Parks and was posted on the bulletin board in Borough Hall before June 7, 1992. (See **Exhibit B,** 628 L19-25; P629 L1-23 to the Board's moving brief.)

WHEREFORE, the defendant Board of Education respectfully requests that its motion for summary judgment be granted in its entirety.

METHFESSEL & WERBEL, ESQS.
Attorneys for Defendant Board
of Education

By /s/ Donald L. Crowley
Donald L. Crowley, Esq.-2586

Dated: August 28, 1996